TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 231, 182.

RICHARD F. CAFFREY, AS COUNTY CLERK OF OKLAHOMA COUNTY, OKLAHOMA TERRITORY, PLAINTIFF IN ERROR AND APPELLANT,

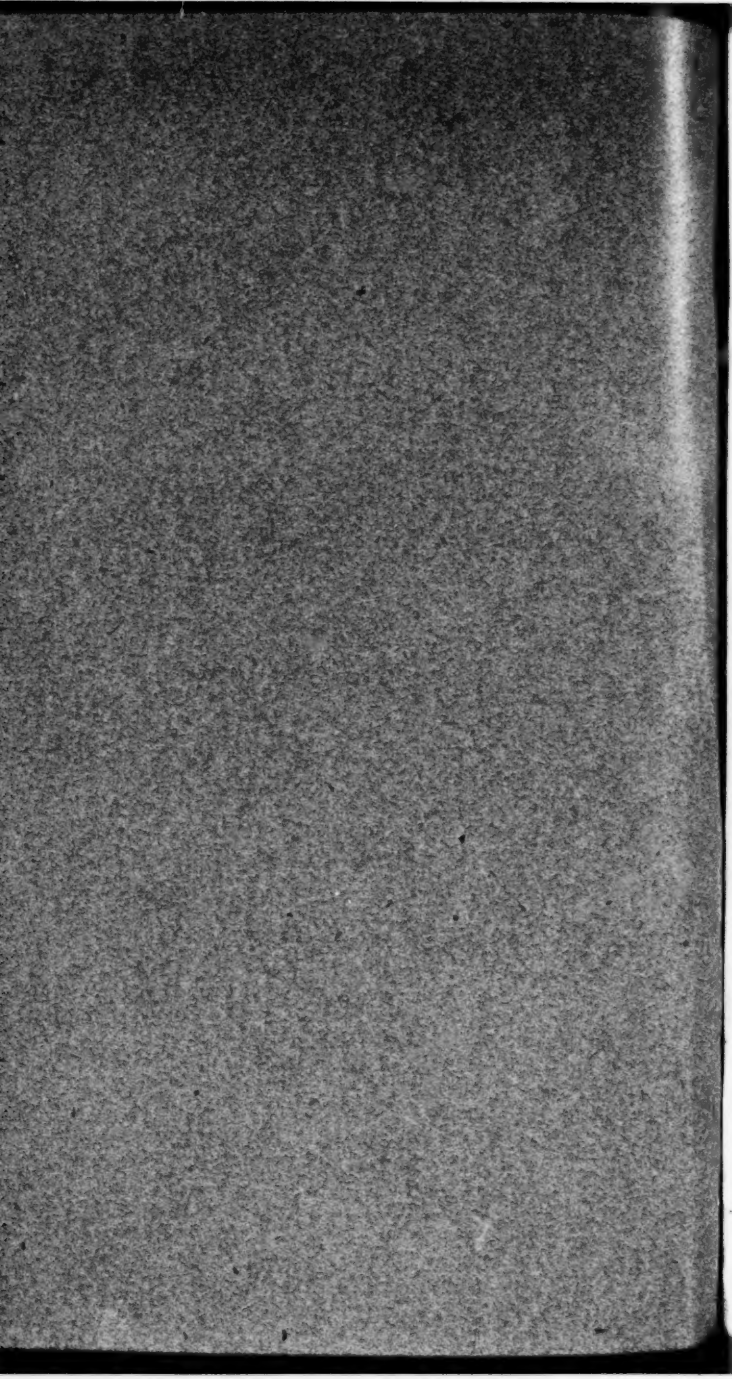
vs.

THE TERRITORY OF OKLAHOMA ON THE RELATION OF HARPER S. CUNNINGHAM, ATTORNEY GENERAL.

IN ERROR TO AND ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED JANUARY 4, 1899.

(17,246.)



(17,246.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 661.

RICHARD F. CAFFREY, AS COUNTY CLERK OF OKLAHOMA COUNTY, OKLAHOMA TERRITORY, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE TERRITORY OF OKLAHOMA ON THE RELATION OF HARPER S. CUNNINGHAM, ATTORNEY GENERAL.

IN ERROR TO AND ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 15, 1899.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Oklahoma, before you or some of you, between The Territory of Oklahoma on the relation of Harper S. Cunningham, attorney general, plaintiff, and Richard F. Caffrey, as county clerk of Oklahoma county, Oklahoma Territory, defendant, a manifest error hath happened, to the great damage of the said defendant, Richard F. Caffrey, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 3rd day of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Supreme Court, Territory of Oklahoma.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 5th day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory.

Allowed by—
JNO. H. BURFORD,
Chief Justice Supreme Court, Oklahoma.

b Be it remembered that a full, true, and correct copy of the above and foregoing writ of error was deposited in the office of the undersigned, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, on the 5th day of December, A. D. 1898, and in pursuance of the commands contained in said foregoing writ of error I herewith return into the Supreme Court of the United States a full, true, and complete transcript of the record in the case entitled "Territory of Oklahoma on the relation of Harper S. Cunningham, as attorney general, plaintiff, against Richard F. Caffrey, as county clerk of Oklahoma county, Oklahoma Territory, defendant," the same being the identical case mentioned and described in said writ of error, and the transcript herewith returned is as follows, to wit:

c UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

I, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 76, both inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Territory of Oklahoma on the relation of Harper S. Cunningham, as attorney general, plaintiff, against Richard F. Caffrey, as county clerk of Oklahoma county, Oklahoma Territory, defendant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be affixed, at my office, in the city of Guthrie, Logan county, said Territory, on this the 29th day of December, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

Seal Supreme Court, Territory of Oklahoma.

BENJ. F. HEGLER,
Clerk of the Supreme Court.

d Be it further remembered that on the 13th day of August, A. D. 1898, the plaintiff, through its attorney general, filed in the office of the clerk of the supreme court of Oklahoma its motion for an alternative writ of mandamus against the defendant in said above-entitled cause, with Exhibits A and B thereto attached as parts thereof; which said motion and exhibits, together with the endorsements thereon, are in words and figures as follows, to wit:

1 EXHIBIT "B."

TERRITORY OF OKLAHOMA:

OFFICE OF TERRITORIAL AUDITOR,
GUTHRIE, O. T., *June* 27, 1898.

To the county clerk of Oklahoma county, Oklahoma Territory:

I hereby certify that at a meeting of the territorial board of equalization held at Guthrie for the year 1898 the following changes were made in assessed valuation, and the following amount of taxes, for the purposes named, was apportioned to the county of Oklahoma to be assessed upon the taxable property of said county for the year 1898, to wit:

Total valuation as reported by county clerk	$3,080,695
24 per cent. by territorial board of equalization	739,366
Total valuation as fixed by territorial board of equalization	$3,820,061
Railroad property assessed by board of railroad assessors.	336,693
Grand total valuation of county	$4,156,754

Apportionment of Taxes.

For general revenue, 3 mills on the dollar	$12,470 26
For current university fund, .5 mills on the dollar	2,078 37
For current normal school fund, .5 mills on the dollar.	2,078 37
For bond interest fund, .2 mills on the dollar	831 35
For board of education fund, — mills on the dollar	
For the education of the deaf and dumb, .05 mills on the dollar	207 83
For the education of the blind, .05 mills on the dollar	207 83
2 Total, 4.3	$17,874 01

In testimony whereof I have hereunto set my hand and affixed the official seal of my office this 27 day of June, 1898.

S. N. HOPKINS,

[SEAL.] *Auditor of Territory and Secretary Territorial Board of Equalization.*

I, S. N. Hopkins, auditor, hereby certify that the foregoing is a true copy of the original.

Witness my hand and seal this 13 day of August, 1898, at Guthrie, O. T.

Endorsed: 744. Ter. of Oklahoma *ex rel.* Harper S. Cunningham *vs.* Richard F. Caffrey, as Co. clerk of Ok. Ter. Copy of apportionment of taxes. Filed Aug. 13, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy.

3 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. Cunningham, as Attorney General, Plaintiff, *vs.* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	No. 744. Motion.

Comes now the above-named plaintiff, by Harper S. Cunningham, attorney general of the Territory of Oklahoma, by direction of the governor of said Territory, and moves the Hon. B. F. Burwell, associate justice of the supreme court of the Territory of Oklahoma, for an alternative writ of mandamus in the above-entitled cause for the reasons stated in the affidavit of said Harper S. Cunningham hereto attached, made a part hereof and marked Exhibit "A."

A certified copy of notice hereto attached, marked Exhibit " B," is also made a part hereof.

(Signed) HARPER S. CUNNINGHAM,

Attorney General, Oklahoma Territory.

4 EXHIBIT "A."

In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGham, as Attorney General, Plaintiff,
vs.
RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.
} Affidavit.

TERRITORY OF OKLAHOMA, *County of Logan,* } *ss:*

Harper S. Cunningham, being duly sworn, upon his oath states: That he is attorney general of the Territory of Oklahoma, and that as such attorney general, by direction of the gove-nor of said Territory, brought the above-entitled action.

Affiant is informed and believes and therefore states as a fact that Richard F. Caffrey, the above-named defendant, is the duly elected, qualified, and acting county clerk of Oklahoma county, Oklahoma Territory; that heretofore and on, to wit, the 27th day of June, 1898, the territorial board of equalization, at a regular meeting of said board, at the city of Guthrie, Logan county, Oklahoma Territory, did then and there duly find and order that a percentage of twenty-four per centum of the assessed valuation of the property in said county of Oklahoma as returned for the year of 1898 by the county clerk of said county to said board of equalization be added to said assessed valuation, and that thereafter, on said date, the said Richard F. Caffrey was duly notified in writing of the said percentage so found and ordered to be added to the valuation of said
5 property in Oklahoma county; that it is the duty of the said county clerk of said Oklahoma county to add to the total value of the property assessed to each party in said county the percentage so found and ordered.

Affiant further states that the said county clerk, Richard F. Caffrey, has failed and refused and now fails and refuses to so add to the total value of the property assessed as aforesaid the said percentage so found and ordered, and to extend said valuation so increased by said percentage upon the tax-rolls of said Oklahoma county; that plaintiff in this action has no plain and adequate remedy in the ordinary course of the law in the premises.

(Signed) HARPER S. CUNNINGHAM.

Subscribed and sworn to before me this the 12th day of August, 1898.

[SEAL.] (Signed) ALBINA A. STEVENS,
Notary Public.

My commission expires April 12, 1901.

Endorsed: 744. Territory of Oklahoma *ex rel.* Harper S. Cunningham, att'y gen'l Oklahoma, *vs.* Richard F. Caffrey, Co. clerk of

Ok. Co. Affidavit in support of motion for alternative writ of mandamus. Filed Aug. 13, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy.

6 Be it further remembered that theretofore and on, to wit, the 12th day of August, A. D. 1898, Hon. B. F. Burwell, as associate justice of the supreme court of the Territory of Oklahoma, issued an alternative writ of mandamus in said cause; which said writ, together with the endorsements thereon, is in words and figures as follows, to wit:

7 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. Cunningham, as Attorney General, Plaintiff, *vs.* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	No. 744. Alternative Writ of Mandamus.

Territory of Oklahoma to Richard F. Caffrey, county clerk of the county of Oklahoma, Territory of Oklahoma, Greeting:

Whereas it has been duly suggested to me, the undersigned, one of the associate justices of the supreme court of the Territory of Oklahoma, that you, Richard F. Caffrey, are the duly elected, qualified, and acting county clerk of the county of Oklahoma, Territory of Oklahoma, and that heretofore and on, to wit, the 27th day of June, 1898, at a regular meeting thereof, the territorial board of equalization of said Territory duly found and ordered that a percentage, to wit, twenty-four per centum of the assessed valuation of the property in said county as returned for the year of 1898 by the county clerk of said county to said board of equalization be added to said assessed valuation, and that you as such county clerk have been duly notified in writing of the said percentage so ordered to be added to the valuation of property in said county of Oklahoma, and that it is your duty as such county clerk to add to the total value of the property assessed to each person in said county the said percentage so ordered and extend same upon the tax-rolls of said county, and that you as such county clerk have failed and refused and now fail and refuse to so add to the total value of the property assessed to each person the said percentage so ordered and extend same on the tax-rolls of said county, and that there is no plain and
8 adequate remedy in the ordinary course of the law in the premises:

Now, therefore, I, being willing that full and speedy justice should be done in the premises, do command you that immediately upon the receipt of this writ you add to the total value of the property assessed to each person in said Oklahoma county the said per centum so ordered and extend same upon the tax-rolls of said county, or that you appear before the supreme court of the Territory of Okla-

homa, at the court-house, in the city of Guthrie, Logan county, in said Territory, on the 1st day of September, 1898, at 10 o'clock a. m. of said last-named day, to show cause why you have not done so, and return you then and there this writ with your certificate of having done as you are commanded. Should you fail to return this writ as commanded you will be proceeded against for contempt.

Witness my hand this twelfth day of August, 1898, at Oklahoma city, Oklahoma county, Oklahoma Territory.

B. F. BURWELL,
Associate Justice of the Supreme Court of Oklahoma Territory.

Attest: BENJ. F. HEGLER,
Clerk Supreme Court,
[SEAL.] By M. E. KETSCH, *Deputy.*

Endorsed: No. 744. In the supreme court of the Territory of Oklahoma. Territory of Oklahoma *ex rel.* Harper S. Cunningham, as attorney general, plaintiff, *vs.* Richard F. Caffrey, as county clerk of Oklahoma county, O. T., defendant. Alternative writ of mandamus. 8, 12, '98. Writ allowed. B. F. Burwell, associate justice of the supreme court of the Territory of Oklahoma.

9 Be it further remembered that thereafter and on the first day of September, A. D. 1898, the defendant filed in said cause his answer and return to the alternative writ of mandamus, which, together with Exhibits A, B, C, and D thereto attached and made a part thereof and the endorsements thereon, is in the words and figures following, to wit:

10 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. Cunningham, as Attorney General, Plaintiff, *vs.* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	Answer and Return to Alternative Writ of Mandamus.

Now comes the said defendant, Richard F. Caffrey, and, for answer and return to the alternative writ of mandamus issued herein against him, says:

First. That he admits that he is the duly elected, qualified, and acting county clerk of the county of Oklahoma, Territory of Oklahoma, and that heretofore and on, to wit, the 27th day of June, 1898, the territorial board of equalization of said Territory, at an adjourned meeting thereof, made an order finding, among other things, that the assessed valuation of said Oklahoma county should be increased 24 per centum of the assessed valuation of the property in said county, as shown by the assessor's returns within and for said county, after having been equalized by the county board of

equalization thereof, and that said defendant has been duly notified in writing of said order, and, further, that he (defendant) has failed and refused to add said percentage to the valuations of the taxpayers of his said county or to extend same upon the tax-roll.

Second. For a further answer and return to said writ defendant alleges that the said pretended order of the territorial board of equalization made on the said 27th day of June, 1898, is illegal and void for the following reasons: 1st, that said board had no jurisdiction or legal authority to make said order; 2d, that said order was not made by said board for the purpose of equalizing the assessed valuation of the various counties of this Territory, but was, as shown upon its face, made for other and illegal purposes,
11 among which was the increasing of the aggregate valuation of all property of the Territory in the sum of $8,809,505.00; that the total valuation of all the taxable property of said Territory, outside of railroad property, as shown by the returns of the various county clerks to said territorial board of equalization, is the sum of $29,404,279.00, and that said board of equalization by its said pretended order of June 27th, 1898, and of June 29th, 1898, increased the total aggregate value of said property to the sum of $38,213,784.00; that said pretended orders of said board were made arbitrarily and without any competent evidence to justify same and with no further or other evidence than the said assessment-rolls certified thereto by the various county clerks of the different counties of said Territory; that by said pretended order of June 27th, 1898, the assessed valuation of the property, both real and personal, of Pottawatomie county, as certified to said board by the county clerk thereof, appears to have been taken as a basis for the pretended equalization of the assessed valuations of the other counties and for its action in increasing the aggregate assessed valuation of the said Oklahoma county 24 per centum of its original valuation, which amounts to an increase in the sum of $739,366.80; that the valuation placed upon all the taxable property of the said county of Oklahoma, as shown by the assessment-roll certified by this defendant to said territorial board of equalization, was and is the fair and true cash value of all said property, and that said valuation was equally as high (and in some instances higher) as that of the same classes of property of the said Pottawatomie county; that a large portion of the property so assessed and valued for taxation in said county of Oklahoma and whose valuation was so increased to the extent of 24 per centum thereof by the territorial board of equalization consists of money, as shown by said assessment-roll certified to the territorial board of equalization by this defendant; all of which facts alleged in this second count of the defendant's answer and return appear more fully from a copy of the pro-
12 ceedings of said territorial board of equalization from June 20th to 29th, 1898, inclusive, and copies of the assessment-rolls of said Pottawatomie and Oklakoma counties, certified by the county clerks thereof to said board; all of which said copies are hereto attached, made parts hereof, and marked Exhibits "A," "B," and "C."

Third. The defendant, further answering, says that he was prevented from adding the said 24 per centum of increase so ordered by said territorial board of equalization to the original valuation of the taxable property of each tax-payer of his said county by an order of the board of county commissioners thereof, which said order is hereto attached, made part hereof, and marked Exhibit "D;" that said order of said board of county commissioners was made because of the fact that all the taxable property of said Oklahoma county had already been valued for taxation at its actual and true cash value and at a higher valuation than that placed upon similar property in Pottawatomie county prior to the pretended order of said territorial board of equalization increasing same 24 per centum, and defendant demands that he be permitted to offer proof and to have a trial by jury upon this issue of fact; that the pretended order of the said territorial board of equalization in assuming to increase the valuation of all the taxable property of Oklahoma county and the other counties of the Territory other than the railroad property thereof was made without any notice to any of the county officers or tax-payers of said counties and without affording any opportunity to any one in behalf of any of said counties to appear before said board and have a hearing upon the question of whether or not the orders of said board increasing the valuations of the property of said Oklahoma and the other counties of the Territory for taxation *was* in any respect fair, just, or equitable.

Wherefore defendant asks that he be granted a hearing in behalf of the tax-payers of his county in order that he may estab-
13 lish by competent proof the allegations of fact hereinbefore set out, and that upon a final hearing he have judgment against the relator for his costs in this behalf laid out and expended.

(Signed) RICHARD F. CAFFREY, *Defendant.*
(Signed) J. R. KEATON,
Attorney for Defendant.

14 "EXHIBIT A."

GUTHRIE, O. T., *June 20th*, 1898.

Pursuant to the provisions of chapter forty-three of the Session Laws of Oklahoma, 1895, the territorial board of equalization for the Territory of Oklahoma met in the auditor's office, in the city of Guthrie, Monday, June 20, 1898.

The following members were present: Ter. Secretary W. M. Jenkins and Auditor S. N. Hopkins, secretary.

The abstracts of assessments not having been received from the counties, the board adjourned, to meet Saturday, June 25th, at 4.00 p. m.

S. N. HOPKINS,
Ter. Auditor & Sec'ty of Board of Equalization.

GUTHRIE, O. T., *June* 25, 1898.

The territorial board of equalization convened at the auditor's office pursuant to adjournment.

There were present Gov. C. M. Barnes, Ter. Sec't'y W. M. Jenkins, and Auditor S. N. Hopkins, sec't'y of b'd.

The abstracts of assessments not yet having been received from all the counties, the board adjourned, to meet at the auditor's office on Monday, June 27th, 1898, at 10.00 a. m.

S. N. HOPKINS,
Ter. Auditor and Sec't'y of Ter. Board of Equalization.

GUTHRIE, O. T., *June* 27, 1898.

Board met pursuant to adjournment, there being present Governor C. M. Barnes, president; Auditor S. N. Hopkins, secretary of the board, and Attorney General Harper S. Cunningham, Ter. Sec't'y W. M. Jenkins being absent.

All abstracts of assessments having been received by the secretary of the board, the board at once entered upon the work of making a levy. On motion, it was ordered that the rate of general territorial tax for the current year 1898 should be three mills on the dollar on the valuations to be fixed by the board at this meeting; that the tax levy for the support of the normal schools be one-half mill on the dollar; that the levy for the support of the ter. university be one-half mill on the dollar; that the levy for the interest on territorial bonds be one-fifth of a mill on the dollar; that the levy for the education of the deaf and dumb be one-twentieth of a mill on the dollar.

From the computations made by the secretary of the board it was found necessary to make the following changes in the county returns reported to the board, and on motion such changes were ordered to be made, to wit:

Name of county.	Per centum increase.	Per centum decrease.
Beaver	84%	
Blaine	50 "	
Canadian	14 "	
Cleveland	22 "	
Custer	37 "	
D	66 "	
Day	12 "	
Garfield	57 "	
Grant	22 "	
Greer		3%
Kay	42 "	
Kingfisher	58 "	
Lincoln	37 "	
Noble	30 "	
Oklahoma	24 "	
Pawnee	33 "	
Payne	20 "	
Pottawatomie	0 "	
Roger Mills	3 "	
Washita	26 "	
Woods	86 "	
Woodward	29 "	

The abstracts not having been returned for Logan county, the board adjourned, to meet at the auditor's office on receipt of Logan county's returns.

S. N. HOPKINS,
Ter. Auditor & Sec'ty Ter. Board of Equalization.

16 GUTHRIE, O. T., *June* 29, 1898.

The board of equalization met, pursuant to adjournment, at 2.00 p. m.

Present: Gov. C. M. Barnes, president; S. N. Hopkins, auditor and secretary of said board.

On motion, the secretary was directed to make the necessary changes in Logan county's abstracts of return by increasing same 19 per centum, this being on the same basis agreed upon for the other counties of the Territory.

On motion, the board adjourned.

S. N. HOPKINS,
Ter. Auditor & Sec'ty Ter. Board of Equalization.

TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

I, S. N. Hopkins, superintendent of public instruction and *ex officio*

auditor, do hereby certify that the foregoing is a true and correct copy of the proceedings of the territorial board of equalization held on the dates herein given.

Witness my hand this 20th day of July, 1898.

S. N. HOPKINS,
Supt. Public Instruction and ex Officio Auditor.

17 "EXHIBIT B."

TERRITORY OF OKLAHOMA, }
Pottawatomie County. }

I hereby certify that the following is a true and correct statement of the property assessed for taxation in the county of Pottawatomie for the year 1898, as fixed by the county board of equalization:

Personal property.	Number.	Average value.	Assessed value.
1. Horses	10,508	14.87	156,253.96
2. Mules and asses	3,403	25.59	87,082.77
3. Cattle, six months' old and over	14,083	14.11	197,911.13
4. Sheep and goats over three months' old	145	2.00	290.00
5. Swine over three months' old	11,596	1.75	20,293.00
6. Farming implements			17,552.00
7. Wagons	3,072	11.45	35,174.40
8. Pleasure carriages of every description	635	19.80	12,573.00
9. Gold watches	191	9.00	1,719.00
10. Silver and other kinds of watches	509	3.86	1,964.74
11. Plate and jewelry			210.00
12. Piano-fortes	49		3,315.00
13. Other musical instruments			7,332.00
14. Household furniture			45,281.00
15. Interest on bonds of the United States			
16. Territorial and other bonds			100.00
17. Stocks in any company or corporation, current rate			20.00
18. Moneys			16,568.00
19. Credits, actual value			802.00
Bicycles			153.00
20. Average value of merchants' stock for preceding year			133,664.00
21. Average value of merchants' moneys and credits for preceding year			12,065.00
22. Average value of manufacturers' stocks for preceding year			8,717.00
23. Average value of manufacturers' moneys and credits for preceding year			
24. Shares in any vessel or boat			
25. Mortgages and all other securities			4,907.00
26. Promissory notes and accounts			14,137.00
27. Tax-sale certificates			59.00
28. Judgments			
29. Shares in national banks			58,430.00
30. Improvements on unentered lands or lots not deeded			75,748.00
Grain on hand			1,698.00
31. Aggregate value of all other property			38,688.00
Total amount of taxable property			952,708.00

18 *Telegraph and Telephone Property.*

Wires, No. wires ——; miles, No. miles ——; value, value ——; poles, No. ——; value ——; value of instruments ——; value as listed by county ——; value as listed by assessor ——. Telephone total ——.

Assessed as Personal Property.

Real estate—lands.	No. of acres.	Average val. per acre.	Value as listed by assessor.
Improved lands			
Unimproved lands			
Total assessed value of lands	52,187	3.00	156,561.00

Real estate—town and city lots.	Number of lots.	Average val. per lot.	Value as listed by assessor.
Improved town and city lots			
Unimproved town and city lots			
Total assessed value of town and city lots	10,435	31.60	329,779.00

Total value of all taxable property assessed in county, 1,439,048.00.
Total number of polls in county, 3,834.

In testimony whereof I hereunto subscribe my name and affix the seal of my office this 20 day of June, A. D. 1898.

[SEAL.] GEO. M. SOUTHGATE,
County Clerk.

19 Endorsed.

TERRITORY OF OKLAHOMA, } ss:
Pottawatomie County, }

I, Geo. M. Southgate, hereby certify that the within is a true and correct copy of the statement of the assessed valuations of all property assessed in Pottawatomie county, Oklahoma Territory, said statement having been sent to the territorial auditor.

GEO. M. SOUTHGATE, *Co. Clerk.*

Subscribed and sworn to before me this 8th day of Aug., 1898.

[SEAL.] J. D. F. JENNINGS,
Probate Judge.

Pottawatomie County—Statement of Assessment, 1898.

Valuation fixed by Co. board, $1,439,048.00.
Increase by territorial board, — per cent.
Decrease by territorial board, — per cent.
Final valuation, $——.
Filed this — day of ——, A. D. 189–.

—— ——, *Auditor.*

20 EXHIBIT "C."

TERRITORY OF OKLAHOMA, }
Oklahoma County. }

I hereby certify that the following is a true and correct statement of the property assessed for taxation in the county of Oklahoma for the year 1898, as fixed by the county board of equalization :

Personal property.	Number.	Average value.	Assessed value.	Total value of taxable prop.
1. Horses	8,609	$14.50	$124,839.00	
2. Mules and asses	2,285	17.73	40,567.00	
3. Cattle, six months' old and over	9,718	10.22	99,222.00	
4. Sheep and goats over three months' old			140.00	
5. Swine over three months' old	14,060	1.61	22,626.00	
6. Farming implements			27,170.00	
7. Wagons 8. Pleasure carriages of every description	2,880	12.19	34,826.00	
9. Gold watches	not given		3,729.00	
10. Silver and other kinds of watches.				
11. Plate and jewelry			219.00	
12. Piano-fortes 13. Other musical instruments	not given		13,764.00	
14. Household furniture			63,041.00	
15. Interest on bonds of the United States				
Bar fixtures			2,460.00	
16. Territorial and other bonds				
17. Stocks in any company or corporation, current rate				
18. Moneys 19. Credits		31,175.00		
20. Average value of merchants' stock for preceding year.			263,991.00	
21. Average value of merchants' moneys and credits for preceding year.				
22. Average value of manufacturers' stocks for preceding year.				
23. Average value of manufacturers' moneys and credits for preceding year				
24. Shares in any vessel or boat				
21 25. Mortgages and all other securities			71,044.00	
26. Promissory notes and accounts			14,262.00	
27. Tax-sale certificates			311.00	
28. Judgments			175.00	
29. Shares in national banks			36,000.00	
30. Improvements on unentered lands or lots not deeded.			50,913.00	
31. Aggregate value of all other property			78,046.00	
Total amount of taxable property			978,520.00	978,520.00

Telegraph and Telephone Property.

Telegraph property: Wires, No. wires ——; miles, No. miles ——, and value, value ——; poles, No. ——: value ——; value of instruments ——; value as listed by assessor ——. Telephone wires: No. wires ——; miles, No. miles ——, and, value, value ——; poles, No. ——; value ——; value of instruments ——; value as listed by county ——; value as listed by assessor ——; total ——.

Real estate—lands.	Number of acres.	Average val. per acre.	Value as listed by assessor.
Improved lands	277,100	3.71	1,030,361
Unimproved			
Total assessed value of lands			1,030,361

Real estate—town and city lots.	Number of lots.	Average val. per lot.	Value as listed by assessor.
Improvement on lots			519,381.00
Town and city lots	7,125	77.53	552,433.00
Total assessed value of town and city lots			1,071,814.00

Total value of all taxable property assessed in county	$3,080,695.00
Total number of polls in county	
Total value Okla. R. R.	336,692.00
	3,417,387.00

In testimony whereof I hereunto subscribe my name and affix the seal of my office this 18th day of June, A. D. 1898.

[SEAL.] R. F. CAFFREY.

Endorsed.

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

I, R. F. Caffrey, hereby certify that the within is a true and correct copy of the statement of the assessed valuations of all property assessed in Oklahoma county, Oklahoma Territory, said
22 statement having been sent to the territorial auditor.

R. F. CAFFREY,
County Clerk.

Oklahoma County—Statement of Assessment, 1898.

Valuation fixed by county board, $——; increase by territorial board, — per cent.; decrease by territorial board, — per cent; final valuation, $——.

Filed this — day of ——, A. D. 189–.

—— ——, *Auditor.*

23 EXHIBIT "D."

To R. F. Caffrey, county clerk, Oklahoma county, Territory of Oklahoma:

You are hereby instructed not to extend the raise on the valuation of the property of this county made by the territorial equalization board upon your books—

Said territorial raise of 24 % being in the judgment of the commissioners unwarranted, unjust, and without law. You will therefore carry out the different levies on the valuation as equalized by the county board, for the reason that the property of Oklahoma county is assessed at a fair cash value, according to the laws of Congress, by the organic act.

By order of the county commissioners:

[SEAL.] R. KLEINER,
Chairman Board of Co. Com.

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

I, the undersigned, county clerk within and for the above-named county and Territory, hereby certify that the within and foregoing is a correct copy of the original instrument now on record in my office, as appears in Book 2, Com'rs' Proceedings, page 68.

[SEAL.] Witness my hand and official seal this 31st day of August, 1898.

R. F. CAFFREY,
County Clerk.

Endorsed: 744. Territory —— *ex rel.* Cunningham, att'y general, *vs.* Richard F. Caffrey, county clerk, Oklahoma county. Writ of mandamus and return. Filed Sept. 1, '98. Benj. F. Hegler, clerk sup. —. Clerk ent.

24 Be it further remembered that thereafter and on the said first day of September, A. D. 1898, the said plaintiff, through its said attorney general, filed in said cause a motion to quash (or demurrer to) defendant's return to the said alternative writ of mandamus; which said motion to quash (or demurrer), together with the endorsements thereon, is in the words and figures following, to wit:

25 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, as Attorney General of the Territory of Oklahoma, Plaintiff, *vs.* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	# 744.	Motion to Quash Return.

Now comes the above-named plaintiff, by Harper S. Cunningham, attorney general of the Territory of Oklahoma, and moves the court to quash the return and answer to the alternative writ in the above-entitled action, for the reason that said return and answer does not state facts sufficient to constitute a defense in said action.

Wherefore plaintiff asks judgment that a peremptory writ issue, and for costs of this action.

(Signed) HARPER S. CUNNINGHAM,
Attorney for Plaintiff, Attorney General.

Endorsed: No. 744. In the supreme court of Oklahoma Territory. Territory of Oklahoma *ex rel.* Harper S. Cunningham, as attorney general of the Territory of Oklahoma, plaintiff, *vs.* Richard F. Caffrey, as county clerk of Oklahoma Co., O. T., defendant. Demurrer. Motion to quash return. Filed Sept. 1, '98. Benj. F. Hegler, clerk sup. ct. Harper S. Cunningham, att'y for plaintiff. Ent.

26 Be it further remembered that thereafter and on, to wit, the 3rd day of September, A. D. 1898, the said supreme court of the Territory of Oklahoma made, passed, and rendered the rulings, orders, and judgments shown by the journal entry, subsequently signed by the chief justice as of said date and filed and recorded; which said journal entry is in the words and figures following, to wit:

27 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, as Attorney General, Plaintiff, *vs.* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	No. 744.

Now, on this 3rd day of September, 1898, came the above-named parties, plaintiff and defendants, by their respective counsel; and this cause comes on to be heard before the court upon the alternative writ, the return of the defendants to the alternative writ, and the demurrer to said return; and the court, being fully advised in the premises and having duly considered said cause, sustains said demurrer; to which ruling the defendant excepts, and said cause is

now submitted to the court upon the pleadings and demurrer, and the court finds that the matters and facts stated and set forth in the alternative writ are true, and that the motion filed by the defendants to quash said alternative writ ought not, under the facts and the law, to be sustained.

It is therefore considered and ordered that said demurrer be, and the same is, sustained, and a peremptory writ of mandamus is hereby ordered to issue, as prayed for in plaintiff's original application; and it is further ordered that the plaintiff recover of the defendant his costs herein, taxed at six and $\frac{40}{100}$ dollars.

All of which is finally considered and ordered this 3rd day of September, 1898.

JNO. H. BURFORD,
Chief Justice Supreme Court, Oklahoma Territory.

28 Be it further remembered that thereafter and on the 21st day of September, A. D. 1898, the said foregoing journal entry was prepared, filed, and recorded, and a peremptory writ of mandamus issued in behalf of said plaintiff and against this defendant; and which said writ, together with the endorsements thereon, is in the words and figures following, to wit:

29 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, as Attorney General, Plaintiff,
vs.
RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.

Peremptory Writ of Mandamus.

Territory of Oklahoma to Richard F. Caffrey, county clerk of Oklahoma county, Territory of Oklahoma, Greeting:

Whereas it manifestly appears in mandamus proceedings, duly had before the supreme court of the Territory of Oklahoma on the part of the above-named plaintiff, that you, Richard F. Caffrey, are the duly elected, qualified, and acting county clerk of the county of Oklahoma, in the Territory of Oklahoma, and that heretofore, to wit, on the 27th day of June, 1898, at a regular meeting thereof, the territorial board of equalization of said Territory duly found and ordered that a percentage, to wit, twenty-four per centum, of the assessed valuation of the property of said county, as returned for the year, 1898 by the county clerk of said county to said board of equalization, be added to said assessed valuation, and that you, as such county clerk, have been duly notified in writing of the said percentage so ordered to be added to the valuation of property in said county of Oklahoma, and that it is your duty as such county clerk to add to the total value of the property assessed to each person in said county the said percentage so ordered and extend the same

upon the tax-rolls of such county, and that you, as such clerk, have failed and refused and now fail and refuse to so add to the total value of the property assessed to each person the said
30 percentage so ordered and extend the same upon the tax-rolls of such county:

Now, therefore, having fully heard and considered the mandamus proceedings brought against you in the above behalf, you are hereby commanded, immediately after the receipt of this writ or the service of the same upon you, to perform the order and direction of said territorial board of equalization in this, to wit, that you add to the assessed valuation of the property of each person in Oklahoma county, Oklahoma Territory, for the year 1898, the percentage of twenty-four per centum of the assessed valuation of the property in said county returned for the year aforesaid, all as above set forth; and of this writ and what you have done thereunder make due return within ten days from the date of the service of the same upon you, and that you fail not at your peril to obey this order.

Witness the Hon. Jno. H. Burford, the chief justice of the supreme court, at Guthrie, this 21st day of September, 1898.

(Signed) BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Costs in sup. ct., $6.40.

OKLAHOMA COUNTY, O. T., *Sept.* 23, 1898.

I received the original writ of which this is a true copy and executed the same, by delivering the original to Richard F. Caffrey, on the 22nd day of Sept., 1898.

J. R. BARROWS, *Sheriff*,
By C. A. RANDALL,
Under Sheriff.

Fees, .75.

Endorsed as follows: 744. Territory *ex rel.* Harper S. Cunningham, attorney general, pl'ff, *vs.* Richard F. Caffrey, as county clerk of Oklahoma county, O. T., def't. Peremptory writ allowed by the court. Jno. H. Burford, chief justice. Returned and filed Sept. 23, 1898. Benj. F. Hegler, clerk sup. ct.

31 Be it further remembered that thereafter and on the first day of October, A. D. 1898, said defendant filed in said cause his pleading entitled "Return and reply to writ of mandamus," asking the said supreme court of the Territory of Oklahoma "to set aside its decision, judgment, orders, and *writ of* peremptory writ of mandamus;" which said pleading, together with the endorsements thereon, is in the words and figures following, to wit:

32 Original.

In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* Harper S. Cunningham, as Attorney General, Plaintiff, *vs.* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	No. 744. Defendant's Reply to Writ of Mandamus.

1. May it please this honorable court: Defendant in the above-entitled action appears herein, by his attorney, Robert Kittle, for the purpose of making due return and reply to the apparent order of peremptory mandamus made and served upon defendant, who asks that in the consideration of the several counts as numbered in this reply the court state its findings of fact and the law governing the same severally on each seperate number. The facts on which plaintiff bases the jurisdiction of the court being stated in the writ, it proceeds with a command as follows, to wit:

2. "That you add to the assessed valuation of the property of each person in Oklahoma county, Oklahoma Territory, for the year 1898 the percentage of twenty-four — centum of the assessed valuation of the property in said county returned for the year aforesaid, all as above set forth; and of this writ and what you have done thereunder make due return within ten days from the date of the service of the same upon you, and that you fail not at your peril to obey this order."

3. Defendant is the county clerk of said county, duly elected and qualified, and has listed all the taxable property that it is his duty to list at its assessed value, regularly made, equalized, and returned to him for taxation, and all that he is by law required

33 to list.

4. He has no authority to change the assessed valuation of property taxable in said county without special order by the board of county commissioners of said county.

5. He performed this duty, by order of said board of county commissioners and in pursuance of law, before this peremptory writ of mandamus was served upon defendant, and so exhausted his authority to change valuation so assessed and listed in pursuance of law.

6. The plaintiff has not shown by motion or petition nor could he make an affidavit in support of any motion or petition stating the necessary facts to authorize the territorial board of equalization to affirm or verify facts stated therein that would give said board jurisdiction over the defendant, the tax-payers, or the subject-matter in controversy to support any valuation upon the property assessable for taxation in said county.

7. That no person or persons except the regularly authorized assessors of said county can fix a valuation upon property of the tax-payers therein.

8. For jurisdiction to perform this duty requires that the assessor should view and examine the property and the tax-payer under oath. The aggregate valuation so fixed by the assessor and county board of equalization is the only true valuation of property for the purpose of taxation.

9. The territorial board of equalization never saw the taxable property, never questioned the tax-payers as to its value in said county, which is absolutely necessary to enable them to fix a valuation on the same.

10. Said board had no power, jurisdiction, or authority to increase the valuation twenty-four per centum above the assessed valuation.

11. Plaintiff by the peremptory writ seeks the aid of this court to enforce an illegal, void, false, and fraudulent levy of twenty-four per centum of tax upon all the taxable property of the tax-payers
34 of said county, in violation of the personal and official rights of defendant and in violation of the personal and property right- of said tax-payers, which it is the official duty of the defendant to protect herein.

12. The tax-payers of Oklahoma county never had an opportunity to be heard before the territorial board on the question of raising their taxes twenty-four per centum. Without such hearing there exists no jurisdiction or power to increase a tax.

13. The increased value stated in the mandamus in this case is in violation of the organic act of this Territory, illegal, and void.

14. This order of mandamus is in violation of the uniformity of taxation provided for by the Constitution of the United States.

15. It is the duty of this court to restrain the excessive levy and listing of the twenty-four per centum named in its order of mandamus in this action. The court never had any jurisdiction to make or to enforce said writ.

16. The court never has had any jurisdiction over tax-payers or their property or the subject-matter or persons who will be most directly injured by the enforcement of the order of mandamus herein by compelling them to pay an illegal tax and casting a cloud on the title of their taxable property.

17. That by said writ money assessed at its full value, which is the standard and measure of value for taxation, is raised twenty-four per centum above the legal standard — makes the levy illegal and void.

18. The assessed value of the property in said county is $2,945,701. The amount added by said twenty-four per centum raises the value $706,968. The value is so increased to $3,652,669, making the amount of levy exceed the legal limit of taxation fixed by the organic act, and adds over $22,000 for county purposes above the necessary amount levied and listed therefor.

Plaintiff now threatens and is proceeding to enforce said writ, whereby the public business of said county will be suspended
35 and greatly injured if said proceeding be not prevented by order of the court.

Wherefore defendant prays this honorable court to set aside its decision, judgment, orders, and writ of peremptory mandamus

against him for want of jurisdiction over the parties and subject-matter in controversy in the above-entitled action on a reconsideration of the pleadings, evidence, and exceptions taken on the trial and of the facts stated in the return and foregoing reply filed herein.

The court failing so to do, defendant now takes an appeal to the Supreme Court of the United States from said decision, judgment, orders, rulings, and the final order and decision directing said writ to be issued and executed and all proceedings leading to final order.

Defendant asks this court to allow said appeal, to direct a complete transcript of the record of proceedings, evidence, files, objections, and exceptions taken on the trial of said cause to be furnished to perfect said appeal; that plaintiff be adjudged to pay to defendant his costs and damages in and about his defense herein.

(Signed) ROBERT KITTLE,
Attorney for Defendant.

36 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

Verification.

Richard F. Caffrey, being first sworn, on his oath says that he knows the contents of the foregoing reply, and the facts stated therein are true.

RICHARD F. CAFFREY.

Subscribed in my presence and sworn to before me this 30th day of September, 1898.

[SEAL.] JEAN H. EVEREST, *N. P.*

My com. ex. Jan. 11, 1899.

TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

—, Robert Kittle, being first sworn, on my oath say that I am the attorney for defendant in the above entitled action. I had not time to have it typewritten before leaving Oklahoma city, so file this copy in lieu of the manuscript and prepared the foregoing return and reply and procured the verification thereof to the manuscript, and that this is a true copy thereof, and the facts therein are true.

(Signed) ROBERT KITTLE.

Subscribed and sworn to before me on this 30th day of September, 1898.

[SEAL.] (Signed) F. N. WEIRICK,
Deputy District Clerk.

Endorsed: No. 744. Original. In the supreme court of the Territory of Oklahoma. —— *ex rel.* Harper S. Cunningham *vs.* Richard F.

Caffrey, clerk. Return and reply of defendant. Filed October 1, 1898. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy. Ent. Robert Kittle, attorney for defendant.

37 Be it further remembered that thereafter and on the 12th day of November, A. D. 1898, said plaintiff, through its attorney general, filed in said cause its application for a rule upon said defendant to show cause before said supreme court why he should not be punished for contempt for failure to comply with the original judgment rendered therein; which said application, together with the endorsements thereon, is in the words and figures following, to wit:

38 TERRITORY OF OKLAHOMA:

In the Supreme Court.

THE TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGham, Att'y Gen'l, Plaintiff,
vs.
RICHARD F. CAFFREY, County Clerk of Oklahoma County, Defendant.

Comes now on this the 12th day of November, 1898, Harper S. Cunningham, and shows to the court that he is the duly appointed, qualified, and acting attorney general of the Territory of Oklahoma; that Richard F. Caffrey, the county clerk of Oklahoma county, in said Territory, as defendant in the above case, has utterly failed, neglected, and refused to in any manner comply with and obey the peremptory writ of mandamus heretofore issued by this court in the above-entitled action, and this without cause or excuse on his part.

The said attorney general further shows that said neglect of said defendant will work an irreparable damage to the plaintiff in this, that that portion of the territorial tax based upon the raise of valuation made by the territorial board of equalization for the — 1898 will not be collected.

That the foregoing allegations are fully shown by the sworn return of the said defendant to said peremptory writ of mandamus now on file in this court.

Wherefore the plaintiff prays that a rule be issued upon the said defendant to show cause before the supreme court, at a time to be fixed by the chief justice, why he should not be punished as for contempt of this court, and that he be compelled by process of this court to comply with and obey said peremptory writ of man-
39 damus, and for such other and further order as may be proper in the premises.

(Signed) HARPER S. CUNNINGHAM,
Attorney General.

Endorsed: 744. Territory of Oklahoma *v.* R. F. Caffrey. Motion for rule. Filed Nov. 12, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy. Harper S. Cunningham, att'y gen'l.

40 Be it further remembered that thereafter and on, to wit, the 22nd day of November, A. D. 1898, the Hon. John H. Bruford, as chief justice of said supreme court of the Territory of Oklahoma, made an order sustaining said motion of said plaintiff and requiring defendant to show cause why he should not be punished as for contempt of said court; which said order, together with the endorsements thereon, is in the words and figures following, to wit:

41 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. Cunningham, Attorney General, Plaintiff, *vs.* RICHARD F. CAFFREY, County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	Order. No. 744.

Now, on this 22 day of November, 1898, at chambers, in the city of Guthrie, Logan county, Oklahoma Territory, before me, John H. Burford, chief justice of the supreme court of said Territory, the above-entitled cause came on to be heard upon motion of the plaintiff, Territory of Oklahoma, for rule upon defendant, Richard F. Caffrey, requiring said defendant to appear and show cause why he, the said defendant, should not be dealt with as for contempt of said court;

And whereas it appears that a peremptory writ of mandamus, enjoining upon said defendant the performance of certain lawful duties therein specified, was duly issued in said cause on the 21st day of September, 1898;

And whereas it further appears that said writ was duly served upon said defendant on the 22 day of September, 1898;

And whereas it duly appears by the aforesaid motion that the said defendant has without just excuse wholly neglected and refused to perform the duties enjoined upon said defendant by said peremptory writ of mandamus:

Now, therefore, it is considered and ordered that said motion be, and the same is hereby, sustained.

And it is further ordered that the said defendant, Richard F. Caffrey, be and appear before the said supreme court, at a session thereof to be holden at said city of Guthrie, in said county
42 and Territory, on the 2nd day of December, 1898, and at 10 o'clock a. m. of said last-mentioned day, then and there to show cause, if any, why he, the said defendant, should not be punished as for contempt of said court.

And it is further ordered, and the clerk of said court is hereby directed, to issue a rule in said cause upon said defendant to the above and foregoing effect.

(Signed) JNO. H. BURFORD,
Chief Justice.

Endorsed: No. 744. In supreme court. Territory of Oklahoma *ex rel. vs.* Richard F. Caffrey, Co. clerk. Order. Filed Nov. 22, '98. Benj. F. Hegler, clerk sup. court.

43 Be it further remembered that thereafter and on, to wit, the 23rd day of November, A. D. 1898, a rule against defendant to show cause why he should not be punished for contempt was issued in pursuance of said foregoing order; which said rule, together with the endorsements thereon, is in the words and figures following, to wit:

44 UNITED STATES OF AMERICA, }
Territory of Oklahoma, } *ss:*

To Richard F. Caffrey, county clerk of Oklahoma county, Oklahoma Ty.:

You are hereby cited to be and appear before the supreme court of the Territory of Oklahoma, at a special session thereof to be held in the city of Guthrie, on Friday, the second day of December, 1898, at 10 o'clock a. m. of said day, to show cause why you should not be punished for a contempt of said court for failing, neglecting, and refusing to obey the peremptory writ of mandamus of said court issued to you on the 21st day of September, 1898, in the cause of The Territory of Oklahoma *ex rel.* Harper S. Cunningham, attorney general, plaintiff, *vs.* Richard F. Caffrey, as county clerk of Oklahoma county, Oklahoma Territory, defendant, commanding you to add to the assessed valuation of the property of each person in Oklahoma county, Oklahoma Territory, for the year 1898 the percentage of twenty-four per centum of the assessed valuation of the property in said county returned for the year aforesaid.

Witness the Hon. Jno. H. Burford, the chief justice of said court, at Guthrie, this 23 day of November, 1898.

[SEAL.] BENJ. F. HEGLER,
Clerk Sup. Ct.

Endorsed: 744. Territory —— *ex rel.* Harper S. Cunningham *vs.* Richard F. Caffrey, county clerk of Oklahoma county. A true copy. J. R. Barrows, sheriff. C. A. Randall, under sheriff. Rec'd Nov. 28, 1898. R. F. C.

45 Be it further remembered that thereafter and on, to wit, the 2nd day of December, A. D. 1898, the defendant filed in said cause his answer and return to said rule to show cause; which said answer and return, together with the endorsements thereon, is in the words and figures following, to wit:

46 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. Cunningham, as Attorney General, Plaintiff, *vs.* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	No. 744. Answer and Return to Rule to Show Cause.

Now comes the defendant, Richard F. Caffrey, county clerk of Oklahoma county, in the Territory of Oklahoma, and makes this his answer to rule to show cause issued on Nov. 23, 1898, and further return to the peremptory writ of mandamus issued out of said court on the 21st day of September, 1898, and which was served upon him by copy returned herewith on the 22nd day of September, 1898.

Defendant further says that on or about the 23rd day of September, 1898, after service of said writ, in the absence of J. R. Keaton, his former attorney in said cause from said county, he consulted with Robert Kittle, then an attorney-at-law at Oklahoma city, in said county, who had, in the absence of said Keaton, been employed by the board of county commissioners of said county to further represent this defendant and the interests of said county in said cause, and the said Kittle took charge of said cause for him as his attorney and advised defendant that he, said Kittle, would prepare and file for defendant a motion for a rehearing of said cause in said supreme court, together with a reply to said writ.

That thereupon said Kittle did then draft and prepare said motion for rehearing and reply to said writ, duly verified by defendant, and also a printed brief in support of the same, and on or about the 30th day of September, 1898, said Kittle went to the city of Guthrie, in said Territory, to file said reply and
47 motion for rehearing in said supreme court.

That at said time defendant was also informed by his said attorney, Robert Kittle, before he left Oklahoma city for Guthrie that until after a hearing and decision on said reply and motion for rehearing by said supreme court it would not be necessary for this defendant to do anything further concerning the said writ and action.

That he was also advised by his said attorney, Robert Kittle, that, in the opinion of said attorney, said rehearing would be allowed and granted by said court, and that the said decision of said court would be reversed and set aside at the January, 1899, term of said court.

That he was also advised by his said attorney, Robert Kittle, that in case said rehearing was not granted by said court he, the said attorney, would perfect an appeal of said cause for said defendant from the decision of said court to the Supreme Court of the United States, and that this defendant need not give himself any further

concern about said cause until the January session of the supreme court of Oklahoma Territory, at Guthrie.

That defendant was also advised by his said attorney, Robert Kittle, that no appeal could be taken by him to the Supreme Court of the United States in said cause until after a decision had been had and rendered in said cause upon defendant's said reply to said writ and upon said motion for rehearing.

That it has been at all times and still is the purpose and intention of this defendant, in case the final decision of the supreme court of Oklahoma Territory should be adverse to defendant, to appeal said cause to the Supreme Court of the United States.

That said Robert Kittle returned from Guthrie, where he had gone, as aforesaid, to file said reply and motion for rehearing, to his home, in Oklahoma city, and was, as this defendant after-
48 wards learned, very sick at the time of his said return home, and that said Kittle continued very sick and confined to his bed until his death, which occurred on or about the 10th day of November, 1898, and this defendant saw said Kittle only once after his return from Guthrie on said occasion, and the said Kittle was at that time very ill, but he assured this affiant that everything connected with said case was all right, and that there was nothing further to be done relative thereto until the further decision of this court.

Wherefore this affiant prays that he be granted a rehearing in said cause upon the grounds and for the reasons set forth in said application therefor, prepared and filed by the said Robert Kittle, or in the event that this court determines that such rehearing should not be granted, then affiant asks that he be granted an appeal to the Supreme Court of the United States, and that the amount of a supersedeas bond staying the execution of judgment herein be fixed by this court.

(Signed) J. R. KEATON AND
DOUGLAS & DOUGLAS,
Attorneys for Defendant.

TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

Richard F. Caffrey, of lawful age, being first duly sworn, deposes and says that he is the defendant above named; that he has read the foregoing return and affidavit and knows that the matters and things therein set forth are true and correct.

(Signed) RICHARD F. CAFFREY.

Subscribed and sworn to before me this 1st day of December, 1898.

[SEAL.] (Signed) B. D. SHEAR,
District Clerk.

Endorsed: No. 744. Territory *ex rel.* att'y gen'l *vs.* Richard F. Caffrey, Co. att'y. Application for rehearing and showing why — should not be punished for contempt. Filed Dec. 2, 1898. Benj. F. Hegler, clerk sup. ct.

49 Be it further remembered that thereafter and on, to wit, the said 2nd day of December, A. D. 1898, the said supreme court of the Territory of Oklahoma made and passed an order overruling and denying the return of defendant to the peremptory writ of mandamus and refusing to grant a rehearing in said cause; which said order is in the words and figures following, to wit:

50 In the Supreme Court.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, Attorney General, Plaintiff,
vs.
RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Defendant.

Now, on this second day of December, 1898, the court overrules and denies the answer of defendant to the peremptory writ of mandamus heretofore issued and refuses to grant a rehearing; to which orders the defendant, by counsel, excepts and prays an appeal to the Supreme Court of the United States, which is allowed, and the chief justice is directed to sign all writs, orders, and citations.

JNO. H. BURFORD,
Chief Justice.

51 Be it further remembered that thereafter and on the same date the said supreme court made and passed a further order, holding that defendant's answer to said rule to show cause was insufficient and adjudging him in contempt of said court, and committing him to the jail of Oklahoma county until he should comply with the judgment of said supreme court, dated September 3rd, 1898; which said order is in the words and figures following, to wit:

52 To the sheriff of Oklahoma county:

UNITED STATES OF AMERICA, *Territory of Oklahoma*, } *ss*:

In the Supreme Court.

TERRITORY OF OKLAHOMA on the Relation of HARPER S. CUNNINGHAM, Attorney General, Plaintiff,
vs.
RICHARD F. CAFFREY, County Clerk of Oklahoma County, O. T., Def't.

And now, on the 2d day of December, A. D. 1898, this cause comes on to be heard upon the rule heretofore issued citing the defendant, Richard F. Caffrey, to appear and show cause, if any he have, why he should not be *be* adjudged in contempt of court for failure to comply with the peremptory writ of mandamus heretofore granted and issued in said cause; and said cause coming on to be heard upon the showing made by the attorney general and the

answer of the defendant to said rule, and the court, being fully advised, finds that the said Richard F. Caffrey has not complied with the commands of said peremptory writ of mandamus or performed the duties therein required of him, and that he has shown no legal excuse for said failure, it is now—

Ordered and adjudged by the court that the said Richard F. Caffrey is in contempt of this court; and it is further ordered
53 that he be imprisoned in the county jail of Oklahoma county until such time as he shall in all things perform the duties and do the things required of him, as commanded in said peremptory writ of mandamus, and the sheriff of said Oklahoma county is hereby commanded to immediately arrest the said Richard F. Caffrey and commit him to said jail.

It is further ordered that if the said Richard F. Caffrey shall file with the sheriff of said Oklahoma county his affidavit to the effect that he is ready and willing to at once begin the work of extending said taxes upon the tax-rolls of said county, as commanded in said writ, and carry the same on to completion as rapidly as the same can be done, and that he will promptly and energetically perform all the requirements of said writ, then the said sheriff shall release him from imprisonment, in order to enable him to perform said duties, and the said commitment shall be suspended until the further order of this court.

JNO. H. BURFORD,
Chief Justice.

54 Be it further remembered that thereafter and on the 5th day of December, A. D. 1898, defendant filed in said cause his petition for writ of error, with assignments attached, and an affidavit showing the amount in controversy to exceed the sum of five thousand dollars, exclusive of costs; which said petition, together with the endorsements thereon, is in the words and figures following, to wit:

55 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. Cunningham, as Attorney General, Plaintiff, *vs.* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	Petition for Writ of Error.

Comes now the defendant, Richard F. Caffrey, and says that on the 3rd day of September, 1898, this court entered judgment herein in favor of the plaintiff and against this defendant, sustaining plaintiff's demurrer to the answer and return of this defendant to the alternative writ of mandamus, and ordering and allowing a peremptory writ of mandamus against him and in favor of said plaintiff; and on the 2nd day of December, 1898, this court entered a further judgment overruling the reply and return of said defendant to the said peremptory writ of mandamus and refusing to grant a rehear-

ing in said cause and affirming the former decision of September 3rd, 1898, herein, in which said orders, judgments, and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant.

All of which will more in detail appear from the assignment of errors which is filed with this petition.

This defendant further, in his behalf, shows that the amount in controversy in this cause, exclusive of costs, exceeds the sum or amount of five thousand ($5,000.00) dollars, and is of about the sum or amount of twenty-eight thousand seven hundred and fifty-one dollars and eighty-seven cents ($28,751.87), as more fully appears by the affidavit of said defendant, which is hereto attached.

56 Wherefore this defendant prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

(Signed) JAMES R. KEATON,
Attorney for Defendant, Richard F. Caffrey.

57 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. Cunningham, as Attorney General, Plaintiff,
vs.
RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.
} Affidavit Showing the Amount in Controversy.

TERRITORY OF OKLAHOMA, *County of Oklahoma,* } *ss:*

James R. Keaton, of lawful age, being first duly sworn according to law, on his oath says that he is attorney for the defendant, Richard F. Caffrey, in the above-entitled action; that he is familiar with the controversy involved in this cause and knows the amount at issue therein and involved therein and of controversy therein, and knows the amount in controversy in said cause, exclusive of costs, to exceed the sum of five thousand ($5,000.00) dollars, and to be about the sum of twenty-eight thousand seven hundred and fifty-one dollars and eighty-seven cents ($28,751.87).

(Signed) JAMES R. KEATON.

Subscribed and sworn to before me this 5th day of December, 1898.

(Signed) BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court, Oklahoma Territory.*

58 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, as Attorney General, Plaintiff,
vs.
RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.
} Assignment of Errors.

The defendant in this action, Richard F. Caffrey, in connection with his petition for a writ of error and as a part thereof makes the following assignment of errors which he avers occurred upon the trial of this case, to wit:

First. The court erred in sustaining the demurrer to (or motion to quash) the return of this defendant to the alternative writ of mandamus issued in this cause.

Second. The court erred in not carrying said demurrer back and sustaining same to said alternative writ of mandamus.

Third. The court erred in not carrying said demurrer back and sustaining same to the motion and application filed in said cause asking for the issuance of the alternative writ of mandamus.

Fourth. The court erred in rendering judgment upon the pleadings in favor of plaintiff and against this defendant after having sustained said demurrer to defendant's said return to the alterna- writ of mandamus.

Fifth. The court erred in allowing and ordering a peremptory writ of mandamus in favor of said plaintiff and against this defendant.

Sixth. The court erred in overruling and denying defendant's return and reply filed herein on October first, 1898, to the
59 peremptory writ of mandamus issued out of this court on September 21st, 1898, and in refusing to set aside its decisions, judgment, and order granting said peremptory writ of mandamus.

Wherefore the said Richard F. Caffrey prays that the said orders and judgments aforesaid may be reversed, annulled, and held for naught, and that he may be restored to all goods which he has lost by reason of the said orders and judgments.

(Signed) JAMES R. KEATON,
Attorney for Defendant.

Endorsed: No. 744. Territory of Oklahoma *ex rel.* Cunningham *v.* R. F. Caffrey, Co. clerk. Petition for writ of error and assignment of errors. Filed this 5th day of December, 1898. Benj. F. Hegler, clerk sup. ct. J. R. Keaton, att'y for def't.

60 Be it further remembered that thereafter and on the same date said defendant filed in said cause his petition on appeal, with assignments of error attached, and an affidavit showing the amount in controversy, exclusive of costs, to exceed the sum of five thousand dollars; which said petition on appeal and allowance

thereof, asisgnments of error, and affidavits, together with the endorsements thereon, are in the words and figures following, to wit:

61 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, as Attorney General, Plaintiff, Respondent,
vs.
RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant, Appellant.
} Appeal and Allowance.

The above-named defendant, Richard F. Caffrey, conceiving himself aggrieved by the order and judgment entered on September 3rd, 1898, in the above-entitled cause and proceeding, and also by the denial and overruling of his reply and return to the peremptory writ of mandamus and the affirmance of said former judgment and order on the 2nd day of December, 1898, doth hereby appeal from said orders and judgments of September 3rd, 1898, and December 2nd, 1898, to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith and hereto attached, and he prays that this his appeal may be allowed, and that a transcript of the records and proceedings and papers upon which said orders and judgments were made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 5th day of December, 1898.

(Signed) JAMES R. KEATON,
Attorney for Appellant, Richard F. Caffrey.

GUTHRIE, OKLAHOMA, *December 5th*, 1898.

Now, to wit, on December fifth, 1898, it is ordered that the appeal be allowed as prayed for.

(Signed) JNO. H. BURFORD,
Chief Justice Supreme Court Oklahoma.

62 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* Harper S. Cunningham, as Attorney General, Plaintiff,
vs.
RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.
} Affidavit Showing Amount in Controversy.

TERRITORY OF OKLAHOMA, } *ss:*
County of Oklahoma, }

James R. Keaton, of lawful age, being first duly sworn according to law, on his oath says that he is attorney for the defendant, Richard F. Caffrey, in the above-entitled action; that he is familiar with

the controversy involved in this cause and knows the amount at issue therein and involved therein and of controversy therein, and knows the amount in controversy in said cause, exclusive of costs, to exceed the sum of five thousand ($5,000.00) dollars and to be about the sum of twenty-eight thousand seven hundred and fifty-one dollars and eighty-seven cents ($28,751.87).

JAMES R. KEATON.

Subscribed and sworn to before me this 5th day of December, 1898.

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court, Oklahoma Territory.*

63 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. Cunningham, as Attorney General, Plaintiff,
vs.
RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.
} Assignment of Errors on Appeal.

The defendant in this action, Richard F. Caffrey, in connection with his appeal and as a part thereof, makes the following assignment of errors, which he avers occurred upon the trial of this case, to wit:

First. The court erred in sustaining the demurrer to (or motion to quash) the return of this defendant to the alternative writ of mandamus issued in this case.

Second. The court erred in not carrying said demurrer back and sustaining same to said alternative writ of mandamus.

Third. The court erred in not carrying said demurrer back and sustaining same to the motion and application filed in said cause asking for the issuance of the alternative writ of mandamus.

Fourth. The court erred in rendering judgment upon the pleadings in favor of plaintiff and against this defendant after having sustained said demurrer to defendant's said return to the alternative writ of mandamus.

Fifth. The court erred in allowing and ordering a peremptory writ of mandamus in favor of said plaintiff and against this defendant.

Sixth. The court erred in overruling and denying defendant's return and reply filed herein on October first, 1898, to the peremptory writ of mandamus issued out of this court on September
64 21st, 1898, and in refusing to set aside its decision, judgment, and order granting said peremptory writ of mandamus.

Wherefore the said Richard F. Caffrey prays that the said orders, judgments, and decrees herein complained of be reversed.

(Signed) JAMES R. KEATON,
Attorney for Defendant.

Endorsed: No. 744. Territory of Oklahoma *ex rel.* Cunningham *v.* R. F. Caffrey, Co. clerk. Petition on appeal, allowance, and assignment of errors. Filed this 5th day of December, 1898. Benj. F. Hegler, clerk sup. ct. J. R. Keaton, att'y for def't.

65 Be it further remembered that thereafter and on the same date the Hon. John H. Burford, chief justice of said court, made an order allowing the writ of error prayed for by defendant in his said petition; which said order is in the words and figures following, to wit:

66 In the Supreme Court of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. Cunningham, as Plaintiff, *versus* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, as Defendant.	Allowance of Writ of Error and Denial of Supersedeas.

This fifth day of December, 1898, came the defendant, by his attorney, and filed herein and presented to me as chief justice of the supreme court his petition praying for the allowance of a writ of error intended to be urged by him, and praying also that a transcript of the record of the proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other proceedings may be had as may be proper in the premises.

On consideration whereof I, Jno. H. Burford, chief justice, do hereby allow the writ of error prayed for, and application for supersedeas is denied.

Witness my hand this fifth day of December, 1898.

(Signed) JNO. H. BURFORD,
Chief Justice Supreme Court Oklahoma.

67 Be it further remembered that thereafter and on the same date a writ of error was issued and an appeal allowed in said cause. (See writ of error preceding this record and allowance of appeal, Rec., p. 61.)

Be it further remembered that thereafter and on the same date the following citations on said writ of error and appeal were issued by the Hon. John H. Burford, as chief justice of said court, to wit: (See pages 68 and 69.)

And afterwards and on the 28th day of December, A. D. 1898, the acceptance of service of plaintiff, as endorsed on said citations, was made.

68 THE UNITED STATES OF AMERICA, *ss:*

To the Territory of Oklahoma *ex rel.* Harper S. Cunningham, attorney general of said Territory, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the 3rd day of January next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma, wherein The Territory of Oklahoma on the relation of Harper S. Cunningham, as attorney general, is plaintiff and Richard F. Caffrey, as county clerk Oklahoma county, said Territory, is defendant, to show cause, if any there be, why the judgment rendered against the said defendant, as in the said writ of error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of December, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

JNO. H. BURFORD,
Chief Justice Supreme Court Oklahoma.

[Seal Supreme Court, Territory of Oklahoma.]

Attest: BENJ. F. HEGLER,
Clerk Supreme Court, Oklahoma Territory.

TERRITORY OF OKLAHOMA, }
County of Logan. }

I hereby, this 28th day of December, A. D. 1898, accept due personal service of this citation on behalf of The Territory of Oklahoma, defendant in error.

HARPER S. CUNNINGHAM,
Attorney General of Oklahoma Territory.

69 THE UNITED STATES OF AMERICA, *ss:*

To the Territory of Oklahoma *ex rel.* Harper S. Cunningham, attorney general, Greeting:

Whereas Richard F. Caffrey, county clerk of Oklahoma county, Oklahoma Territory, has lately appealed to the Supreme Court of the United States from an order and decree lately rendered in the supreme court of the Territory of Oklahoma, made in favor of this Territory of Oklahoma on the relation of you, said Harper S. Cunningham, attorney general of said Territory, and has filed the security required by law, you are therefore hereby cited to appear before the Supreme Court of the United States, at the city of Washington, on the 3rd day of January next, to do and receive what may appertain to justice to be done in the premises.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court United States, this fifth day of December, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

JNO. H. BURFORD,
Chief Justice Supreme Court of Oklahoma.

[Seal Supreme Court, Territory of Oklahoma.]

Attest: BENJ. F. HEGLER,
Clerk Supreme Court, Oklahoma Territory.

TERRITORY OF OKLAHOMA, }
County of Logan. }

I hereby accept due personal service of this citation on this 28th day of December, A. D. 1898, on behalf of The Territory of Oklahoma, appellee.

HARPER S. CUNNINGHAM,
Attorney General of Oklahoma Territory.

70 Be it further remembered that thereafter and on the same date true and complete copies of said appeal and allowance and said writ of error were lodged in the office of the clerk of said supreme court of the Territory of Oklahoma for the adverse party, as shown by the certificate of said clerk of said date; which said certificate is in the words and figures following, to wit:

71 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* Harper S. Cunningham, *at At—*, *vs.* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	Certificate Showing that Appeal and Writ of Error Have Been Deposited in Office of Clerk.

I, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that on the 5th day of December, 1898, the defendant in the said above-entitled cause lodged in my office a true copy of the appeal allowed and the writ of error granted and issued in said cause for the adverse party, to wit, the plaintiff.

Witness my hand and the seal of said court, at Guthrie, this 5th day of December, 1898.

(Signed) BENJ. F. HEGLER,
[SEAL.] *Clerk Sup. Ct.*

72 Be it further remembered that thereafter and on the 8th day of December, A. D. 1898, a second and written application for an order permitting defendant to give a good and sufficient

bond to act as a supersedeas in said cause was filed therein and presented to the Hon. John H. Burford, as chief justice of said court; which said application, together with the endorsements thereon, is in the words and figures following, to wit:

73 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* Harper S. Cunningham, as Attorney General, Plaintiff, *vs.* RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.	Application for Order Allowing Defendant to Give Supersedeas Bond.

Comes now the defendant, Richard F. Caffrey, by his attorney, and asks the Hon. John H. Burford, chief justice of the said supreme court of the Territory of Oklahoma, to grant him the right to give bond in said cause superseding and staying the execution of the judgment rendered therein, and also asks that the amount of said bond be now fixed by the said chief justice, and shows in support of this application that on the 5th day of December, 1898, this defendant filed in said court his petition for a writ of error, with assignment of errors attached, and also his petition on appeal, with assignment of errors attached, and that on said date said petitions were presented to the Hon. John H. Burford, as chief justice of said court, and thereupon the said chief justice made an order granting said writ of error, and said writ of error was thereupon and on the same date allowed by said chief justice and issued and made returnable on the 3rd day of January next. On said date said chief justice also allowed the appeal prayed for; that thereafter and on the said 5th day of December, 1898, this defendant caused to be lodged in the office of the clerk of this court a true and correct copy of said writ of error and of said appeal for the adverse party, to wit, the plaintiff herein, and that said copies of said writ of error and appeal are now so deposited with said clerk for such purpose; that this defendant further shows to said chief justice that the judgment in this case is one which may properly be superseded upon the execution of a good and sufficient bond, which he now hereby
74 offers to execute and furnish in such sum as you, the said chief justice, may deem reasonable and proper.

JAMES R. KEATON,
Attorney for Defendant.

Endorsed: No. —. Territory of Oklahoma *ex rel.* Harper S. Cunningham *vs.* Richard F. Caffrey, county clerk. Application for order allowing defendant to give supersedeas bond. Filed Dec. 8, '98. Benj. F. Hegler, clerk supreme court. J. R. Keaton, att'y for def't.

75 Be it further remembered that thereafter and on the same date the said chief justice made an order overruling and

denying said application; which said order is in the words and figures following, to wit:

76 In the Supreme Court of the Territory of Oklahoma.

TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, as Attorney General, Plaintiff,
vs.
RICHARD F. CAFFREY, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant. } Order.

Now, on this eighth day of December, 1898, the defendant, by his counsel, applies for a supersedeas and stay of proceedings in the above-entitled cause, and the same coming on for hearing before me in chambers, and it appearing that the appeal in said cause and application for writ of error was not taken or requested until after the defendant had been committed to the county jail of Oklahoma county by the judgment of the supreme court adjudging him in contempt for failure to obey the peremptory writ of mandamus in said cause, and believing that there can be no serious controversy as to the questions of law involved in said cause, said application for a supersedeas is hereby overruled and denied; to all of which defendant excepted and excepts.

Done in chambers, at the city of Guthrie, this December 8th, 1898.

(Signed) JNO. H. BURFORD,
Chief Justice.

77 UNITED STATES OF AMERICA, *Territory of Oklahoma*, } *ss:*

I, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true, and complete transcript of the records in a cause therein entitled Territory of Oklahoma on the relation of Harper S. Cunningham, as attorney general, plaintiff, against Richard F. Caffrey, as county clerk of Oklahoma county, Oklahoma Territory, defendant, as the same appears of record and on file in my office.

Seal Supreme Court, Territory of Oklahoma.

In testimony whereof I have hereunto subscribed my name and caused the seal of said court to be affixed, at my office, in the city of Guthrie, on this the 29th day of December, A. D. 1898, and of the Independence of the United States of America the one hundred and twenty-third.

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 17,246. Oklahoma Territory supreme court. Term No., 661. Richard F. Caffrey, as county clerk of Oklahoma county, plaintiff in error & appellant, *vs.* The Territory of Oklahoma on the relation of Harper S. Cunningham, attorney general. Filed January 4th, 1899.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898

RICHARD F. CAFFREY,
COUNTY CLERK, OKLAHOMA COUNTY, OKLAHOMA TERRITORY.
Plaintiff in Error and Appellant,

v.

TERRITORY OF OKLAHOMA,
EX REL. HARPER S. CUNNINGHAM, ATTORNEY GENERAL,
Defendant in Error and Appellee.

Motion of Richard F. Caffrey, Plaintiff in Error and Appellant, for an Order Allowing Him a Supersedeas, or Other Appropriate Order, in said Cause.

Comes now the plaintiff in error and appellant, Richard F. Caffrey, by his counsel James R. Keaton, and moves this Honorable Court to make an order granting him the right to give a good and sufficient

supersedeas bond staying proceedings upon the judgment of the Supreme Court of the Territory of Oklahoma, rendered September 3rd, 1898, and reaffirmed December 2nd, 1898, in this cause and to quash. annul and set aside the order of said Supreme Court of said Territory dated December 2nd, 1898, committing this plaintiff in error and appellant to the jail of Ohlahoma County said Territory and also to annul, set aside and hold for naught the orders of the Honorable John H. Burford, as Chief Justice of said Court, dated December 5th and 8th, 1898, respectively, denying this plaintiff in error and appellant the right to have a supersedeas in said cause and overruling his applications therefor; and this plaintiff in error and appellant asks this Honorable Court to make and pass such other and further appropriate order or orders in this behalf as may, under the law and facts, be just and necessary.

In support of the foregoing motion this plaintiff in error and appellant by his counsel aforesaid shows the following:

FIRST.

That on the 3rd day of September, 1898, the said Supreme Court of Oklahoma Territory rendered judgment in this cause as follows:

> "Now on this 3rd day of September, 1898, came the above named parties, plaintiff and defendant, by their respective counsel, and this cause comes on to be heard before the court, upon the alternative writ, the return of the defendants to the alternative writ, and the demurrer to said re-

turn. And the court being fully advised in the premises and having duly considered said cause, sustains said demurrer, to which ruling the defendant excepts; and said cause is now submitted to the court upon the pleadings and demurrer, and the court finds that the matters and facts stated and set forth in the alternative writ, are true; and that the motion filed by the defendants to quash said alternative writ ought not, under the facts and the law, to be sustained.

"It is therefore considered and ordered that said demurrer be and the same is sustained, and a peremptory writ of mandamus is hereby ordered to issue, as prayed for in plaintiff's original application, and it is further ordered, that the plaintiff recover of the defendant his costs herein, taxed at six and forty one-hundredths dollars."

(Rec. p. 27.)

That on the 21st day of September, 1898, said judgment was filed and entered and a peremptory writ of mandamus issued in pursuance of said judgment and on September 22nd, 1898, said writ was served on this plaintiff in error. (Rec pp 29 and 30.)

SECOND.

That on October 1st, 1898, this plaintiff in error through his then counsel, Robert Kittle, filed in said cause an answer and return to said peremptory writ of mandamus in which said pleading he asks for relief as follows:

"WHEREFORE, Defendant prays this Honorable Court to set aside its decision, judgment, orders and writ of peremptory mandamus against him for want of jurisdiction over the parties and subject matter in controversy in the above entitled action, on a reconsideration of the pleadings, evidence and exceptions taken on the trial, and of the facts stated in the foregoing return and reply filed herein.

"The court failing so to do, defendant now takes an appeal to the Supreme Court of the United States, from said decision, judgment, orders, rulings and the final order and decision directing said writ to be issued, and executed and all proceedings leading to final order.

"Defendant asks this court to allow said appeal; to direct a complete transcript of the record of proceedings, evidence, files, objections and exceptions taken on the trial of said cause to be furnished to perfect said appeal. That plaintiff be adjudged to pay to defendant his costs and and damages in and about his defense herein."

(Rec. p. 35.)

That thereafter and on the 12th day of November, 1898, the defendant in error (plaintiff below) filed a motion for a rule on this plaintiff in error (defendant below) to show cause why he should not be punished for contempt of the Supreme Court of said Territory for failing to comply with its said judgment of September 3rd, 1898, and that, in pursuance to the prayer

of said motion a rule upon plaintiff in error to show cause before said Supreme Court on the 2nd day of December, 1898, was granted by the Chief Justice on November 22nd, 1898, and issued by the clerk of said court on the 23rd day of November, 1898. (Rec. pp. 38, 41, 42 and 44;) that on the said 2nd day of December, 1898, plaintiff in error filed in said cause and presented to said court his answer and return to said rule to show cause in which he prayed as follows:

> "Wherefore, this affiant prays that he be granted a rehearing in said cause upon the grounds and for the reasons set forth in said application there-for prepared and filed by the said Robert Kittle, or in the event that this court determines that such rehearing should not be granted, then affiant asks that he be granted an appeal to the Supreme Court of the United States, and that the amount of a supersedeas bond, staying the execution of judgment herein, be fixed by this court."
>
> (Rec. pp. 47 and 48.)

That on the same date said Supreme Court passed an order overruling and denying this plaintiff in error's answer and return to said peremptory writ of mandamus and refusing to grant him a rehearing whichsaid order, omitting the caption, is in words and figures as follows:

> "Now on this second day of December, 1898; the court overrules and denies the answer of defendant to the peremptory writ of mandamus heretofore issued, and refuses to grant a rehearing; to which order the defendant, by counsel,

excepts, and prays an appeal to the Supreme Court of the United States, which is allowed, and the Chief Justice is directed to sign all writs, orders and citations."

(Rec. p. 50.)

That thereafter and on same date said Supreme Court made the following order in said cause upon the said rule to show cause and the answer thereto:

"And now on this 2nd day of December, A. D., 1898, this cause comes on to be heard upon the rule heretofore issued citing the defendant, Richard F. Caffrey, to appear and show cause, if any he have, why he should not be adjudged in contempt of court for failure to comply with the peremptory writ of mandamus heretofore granted and issued in said cause. And said cause coming on to be heard upon the showing made by the Attorney General, and the answer of said defendant to said rule; and the court being fully advised, finds that the said Richard F. Caffrey has not complied with the commands of the said peremptory writ of mandamus, or performed the duties therein required of him, and that he has shown no legal excuse for said failure, it is now

"Ordered and adjudged by the court that the said Richard F. Caffrey is in contempt of this court. And it is further ordered that he be imprisoned in the county jail of Oklahoma County until such time as he shall in all things perform the duties and do the things required of him, as commanded in said peremptory writ of mandamus. And the sheriff of said Oklahoma

County is hereby commanded to immediately arrest the said Richard F. Caffrey and commit him to said jail.

"It is further ordered, that if the said Richard F. Caffrey shall file with the sheriff of said Oklahoma County his affidavit, to the effect that he is ready and willing to at once begin the work of extending said taxes upon the tax rolls of said county, as commanded in said writ, and carry the same on to completion as rapidly as the same can be done; and that he will promptly and energetically perform all the requirements of said writ, then the said sheriff shall release him from imprisonment, in order to enable him to perform said duties, and the said commitment shall be suspended until the further order of this court."

(Rec. pp. 52 and 53.)

THIRD.

That on the 5th day of December, 1898, this plaintiff in error and appellant filed in said cause a petition for a writ of error and petition on appeal together with his assignments of error. (Rec. pp. 55 to 64.) That thereafter and on the same date his petitions for writ of error and appeal were allowed by the Honorable John H. Burford, as Chief Justice of the said Supreme Court of Oklahoma Territory, but in the order allowing said writ of error the application of this plaintiff in error for a supersedeas is denied. (Rec. p. 66.) Thereafter and on same date true copies of said writ of error and appeal were lodged in the office

of the clerk of said court for the adverse party and citations on said writ of error and appeal were signed. (Rec. pp. 68, 69, 71.) That thereafter and on December 8th, 1898, plaintiff in error filed in said cause in the court below his written application for an order allowing him to give supersedeas bond therein which said application, omitting the caption is as follows:

> "Comes now the defendant, Richard F. Caffrey, by his attorney, and asks the Hon. John H. Burford, Chief Justice of the said Supreme Court of the Territory of Oklahoma, to grant him the right to give bond in said cause superseding and staying the execution of the judgment rendered therein, and also asks that the amount of said bond be now fixed by the said Chief Justice, and shows in support of this application that on the 5th day of December, 1898, this defendant filed in said court his petition for a writ of error with assignments of errors attached, and also his petition on appeal, with assignment of errors attached, and that on said date said petitions were presented to the Hon. John H. Burford, as Chief Justice of said Court, and thereupon the said Chief Justice made an order granting said writ of error and said writ of error was thereupon, and on the same date, allowed by said Chief Justice and issued and made returnable on the 3rd day of January, next. On said date said Chief Justice also allowed the appeal prayed for; that thereafter, and on the said 5th day of December, 1898, this defendant caused to be lodged in the office of the clerk of

this court a true and correct copy of said writ of error and of said appeal for the adverse party, towit, the plaintiff herein, and that said copies of said writ of error and appeal are now so deposited with said clerk for such purpose; that this defendant further shows to said Chief Justice that the judgment in this case is one which may properly be superseded, upon the execution of a good and sufficient bond, which he now hereby offers to execute and furnish in such sum as you, the said Chief Justice, may deem reasonable and proper. James R. Keaton, Attorney for Defendant."

(Rec. p. 73.)

That thereafter and on the same date said application was presented to the Hon. John H. Burford, Chief Justice of said court as aforesaid, and he made the following order denying same, towit:

"Now on this eighth day of December, the defendant by his counsel applies for a supersedeas and stay of proceedings in the above entitled cause, and the same coming on for hearing before me in chambers and it appearing that the appeal in said cause and application for writ of error was not taken or requested until after the defendant had been committed to the county jail of Oklahoma County, by the judgment of the Supreme Court adjudging him in contempt for failure to obey the peremptory Writ of Mandamus in said cause, and believing that there can be no serious controversy as to the questions of law

involved in said cause, said application for a supersedeas is hereby overruled and denied. To all of which defendant excepted and excepts.

Done in Chambers at the city of Guthrie this December 8th, 1898

JOHN H. BURFORD,
Chief Justice."

(Rec. p. 76.)

The references hereinbefore made are to the pages of the original transcript of the record as the same had not been printed at the date of the preparation and filing of this motion but the material portions of said record, so far as relates to the questions presented by this motion, are copied herein.

Respectfully Submitted,

JAMES R. KEATON,
For Plaintiff in Error and Appellant.

ARGUMENT UPON MOTION.

No point has been made against either of the applications of plaintiff in error for a supersedeas on the ground that it was not made within the statutory time. In fact, no such objection can be successfully urged, notwithstanding more than sixty days elapsed after the rendition of the original judgment and prior to the lodging of the writ of error and appeal in the office of the Clerk of the Territorial Supreme Court, because said court entertained, considered and passed upon the answer and return of plaintiff in error to the peremptory writ of MANDAMUS wherein he asked that the original judgment be set aside, etc. This gave

plaintiff in error sixty days from the date of the ruling on said answer or application within which to take the necessary steps to procure a supersedeas.

Section 1007 (R. S. U. S.) providing how a writ of error may be a SUPERSEDEAS reads as follows:

"In any case where a writ of error may be a super-
"sedeas, the defendant may obtain such supersedeas
"by serving the writ of error, by lodging a copy there-
"of for the adverse party in the clerk's office where the
"record remains, within sixty days, Sundays exclusive,
"after the rendering of the judgment complained of,
"and giving the security required by law on the issu-
"ing of the citation. But if he desires to stay pro-
"cess on the judgment, he may, having served his
"writ of error as aforesaid, give the security required
"by law within sixty days after the rendition of such
"judgment, or afterward with the permission of a
"justice or judge of the appellate court. And in such
"cases where a writ of error may be a supersedeas,
"execution shall not issue until the expiration of (the
"said term of sixty) (ten) days."

Under this section it has been uniformly held by all the federal courts that the time within which a plaintiff in error or appellant may have a supersedeas does not begin to run until a motion for a new trial or application to set aside the decree or judgment or petition for rehearing (when entertained and considered by the lower court) has been passed upon.

"So the time begins to run from entry of the de-
"cree * * * but if the court entertains a motion to

"open the decree the time does not begin to run until "the motion is disposed of."

Desty's Federal Proceedure, 6th Ed., p. 572.

See also Brockett vs Brockett, 2 How. 238.

Railroad Co v. Bradleys,7 Wall. 575.

Memphis v. Brown, 94 U. S 715.

"Where the writ of error was sued out and served "within sixty days after the decision of a motion for "rehearing, this was in time to secure the SUPER-"SEDEAS."

Texas & Pac Ry. Co. v. Murphy, 111 U. S. 488.

See also Slaughter House Cases, 10 Wall. 273 (289.)

Providence Rubber Co. v. Goodyear, 6 Wall. 153.

"A writ of error will operate as a supersedeas, "under section 1007 of the Rev. St., if duly served "'within 60 days, Sunday exclusive', after a motion "for a new trial has been overruled."

Rutherford v. Penn. Mut. Life Ins. Co., 1 Fed. Rep. 456.

It may be insisted by counsel for defendant in error that the pleading filed by plaintiff in error in the court below on October 1st, 1898,entitled "Return and Reply to Writ of Mandamus" is not such a pleading as can, under the rules of said Territorial Supreme Court,be recognized as either a motion for a new trial or petition for rehearing or that same was not filed within the time or in the manner prescribed by said rules. It is a sufficient answer to this contention, if made, that there is nothing in the record even tending

to show what the rules of said court are and that the court, itself, has treated said pleading as both a return to the peremptory writ of mandamus and a petition or application for rehearing as shown by its order of December 2, 1898, SUPRA. There is no doubt but that said Territorial Supreme Court had the power to have quashed or set aside said peremptory writ in pursuance of the prayer contained in said application.

Merrill on Mandamus, Sec. 297.

State v. Assessors, etc. 51 N. J. L 279, 17 Atl. 122.

In Texas & Pacific Ry. Co. v. Murphy, SUPRA, it is said by Chief Justice Waite, speaking for the court, that: "This record does not show, in express terms, "when a motion for a rehearsing was made, but it was "entertained by the court and decided on its merits. "The presumption is, therefore, in the adsence of any-"thing to the contrary, that it was filed in time to "give the court control of the judgment which had "been entered, and jurisdiction to enforce any order "that might be made. This presumption has not been "overcome." Apply the rule just laid down to the facts disclosed by the record in the case at bar and it seems clear that plaintiff in error has sixty days, Sundays exclusive, from the order of December 2, 1898, within which to serve his writ of error and appeal and give supersedeas bond.

Had the Territorial Supreme Court made an order striking the pleading in question from the files (which, it must be presumed, said court would have done were the pleading not one properly cognizable under the rules or had it been filed out of time) instead of de-

termining same on its merits, then the time limited for an appeal or writ of error would doubtless have commenced to run from the date of the original judgment (September 3rd, 1898,) unless plaintiff in error should show affirmatively that his said pleading is one which, under the rules of the court, ought to have been considered and passed upon.

The real reason, as counsel understands, why the Supreme Court of the Territory of Oklahoma and John H. Burford, chief justice thereof, denied a supersedeas in this cause, is because they hold that the judgment is one which cannot legaly be superseded. It is true that said chief justice assigns two additional reasons in his order of December 8, 1898, (supra) for denying the application of this plaintiff in error and appellant to be permitted to give a good and sufficient supersedeas bond staying further proceedings on said judgment; but there certainly can be no force in either of these. In fact, the first one so assigned is not entirely correct, as an order was passed by the Territorial Supreme Court (in pursuance to requests in pleadings previously filed) allowing an appeal to this Honorable Court, just prior to the one passed by said lower court committing this appellant to jail. The other reason so assigned by the Honorable Chief Justice of said court, to-wit: That he believes, "there can be no serious controversy as to the ques-"tions of law involved in said cause," is truly remarkable. The question of a party's right to a supersedeas surely cannot be affected by the opinion of one of the trial judges (who joins in rendering the decision against said party) upon the merits of the controversy. Of course, the Honorable Chief Justice

of the court below believed that the contentions of this plaintiff in error were not sustained by the law applicable thereto else he could not consistently have concurred in the judgment rendered in the cause. This very belief on the part of the chief justice and a majority of the other members of said court furnishes the necessity for this proceeding in error. However, as to the importance of the legal questions involved herein, I call attention to the fact that they have been decided both ways by the Territorial Supreme Court and that each decision was by a divided court.

Gray vs Stiles, 49 Pac. 1083; and
Wallace vs Bullen, 52 Pac. 954.

That the judgment is one which can properly be superseded, I think, there can be no doubt. In the Oklahoma code in the Ariticle on Mandamus it is provided that: "No other pleading or written allegation "is allowed than the writ and answer; these are the "pleadings in the case, and have the same effect, and "are to be construed and may be amended in the same "manner, as pleadings in a civil action; and the issues "thereby joined must be tried, AND THE FURTHER "PROCEEDINGS THEREON HAD, in the same manner as "in a civil action."

Sec. 724 (4603) Stat. 1893.

By this statutory provision the common law character of the writ of MANDAMUS is materially changed and the proceedings in this class of actions before, during and after trial are the same as in other civil causes. It has been repeatedly decided by this Honorable Court that the proper mode of re-

viewing the final judgment of an inferior court in a MANDAMUS proceeding is by a writ of error and that during the pendency of such writ a sufficient bond of indemnity acts as a SUPERSEDEAS.

U. S. v. Addison, 22 How. 174.
Hartman v. Greenhow, 102 U. S 672.
Davies v. Corbin, 112 U. S. 36.

See also the recent case of State v. Superior Court, 25 Pac. 1007, wherein the Supreme Court of Washington passed upon substantially the same question here under consideration and upon a statute very similar to the one herein quoted from the Oklahoma Code.

As a reason for speedy action, by this Honorable Court, upon the motion for SUPERSEDEAS, special attention is called to the fact that plaintiff in error is now (and has been for several weeks) in the jail of Oklahoma county for failure to perform the final judgment of said Territorial Supreme Court in this cause.

Respectfully Submitted,

James J. R. KEATON,
For Plaintiff in Error and Appellant.

APPENDIX.

In addition to the facts hereinbefore stated by plaintiff in error attention is called to the following affidavit executed and filed in his behalf in the court below as part of his petition in error (R. p. 57.)

IN THE SUPREME COURT

OF THE

TERRITORY OF OKLAHOMA.

Territory of Oklahoma Ex Rel, Harper S. Cunningham, as Attorney General, Plaintiff.
vs.
Richard F. Caffrey, as County Clerk of Oklahoma County, Oklahoma Territory, Defendant.

Affidavit Showing Amount in Controversy.

TERRITORY OF OKLAHOMA, } ss.
COUNTY OF OKLAHOMA. }

James R. Keaton, of lawful age, being first duly sworn according to law, on his oath, says: That he is attorney for the defendant, Richard F. Caffrey, in the above entitled action; that he is familiar with the controversy involved in this cause and knows the amount at issue therein, and involved therein, and of controversy therein, and knows the amount in controversy in said cause exclusive of costs to exceed the sum of five thousand dollars ($5,000.00) and to be about the sum of twenty-eight thousand, seven hundred and fifty-one dollars and eighty seven cents ($28,751.87).

JAMES R. KEATON.

Subscribed and sworn to before me, this 5th day of December, 1898.

[SEAL] BENJ. F. HEGLER.
Clerk Supreme Court, Oklahoma Territory.

No. 182.

Brf. of Keaton for P. in Error on mo

Office Supreme Court U. S.
FILED
MAR 6 1899
JAMES H. McKENNEY,
Clerk

Filed March 6, 1899.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

No. ~~681.~~ 182

RICHARD F. CAFFREY, County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error and Appellant

vs

TERRITORY OF OKLAHOMA, Ex Rel. Harper S. Cunningham, Attorney General, Defendant in Error and Appellee.

Observations, on Motion to Dismiss Cause and Objections to Allowance of Supersedeas Filed by Defendant in Error and Appellee, Submitted with Leave of Court by Counsel for Plaintiff in Error and Appellant.

JAMES R. KEATON,

For Plaintiff in Error and Appellant.

OKLAHOMAN PRINT, OKLAHOMA CITY, OK'LA

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

RICHARD F. CAFFREY, County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error and Appellant

vs

TERRITORY OF OKLAHOMA, Ex Rel. Harper S. Cunningham, Attorney, General, Defendant in Error and Appellee.

Observations, on Motion to Dismiss Cause and Objections to Allowance of Supersedeas Filed by Defendant in Error and Appellee, Submitted with Leave of Court by Counsel for Plaintiff in Error and Appellant.

JAMES R. KEATON,

For Plaintiff in Error and Appellant.

As defendant in error's objections to the allowance of a supersedeas and its motion to dismiss this cause and affirm the judgment of the lower court are

based upon the same grounds and are submitted and urged together, I desire that the following observations be applied to both pleadings.

It is suggested by counsel for defendant in error that this cause should be dismissed because no federal question is involved therein. While, an important federal question is, in fact, involved in said cause and will, in due time, be presented for determination, whether or not such a question is involved is wholly immaterial to the jurisdiction of this court as that is to be determined exclusively by the amount in controversy. It is provided in section 9, Oklahoma Organic Act, that:—"Writs of error and appeals from the final decisions of said Supreme Court shall be allowed and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the Circuit Courts of the United States where the value of the property or the amount in controversy to be ascertained by oath or affirmation of either party or other competent witnesses, shall exceed five thousand dollars;" 26 Stat. 86

By act of Congress of March 3, 1885, providing for appeals and writs of error from the Supreme Courts of the Territories and the District of Columbia to this court, two grounds for jurisdiction are given, the existence of either one being sufficient, towit: 1. Required Amount Involved. 2. Federal Question Involved. District of Columbia vs. Brewers, 131, U. S. 434; Street vs. Ferry, 119, U. S. 385. But, as already seen, the above act does not apply to Oklahoma.

It is next contended by counsel for defendent in error that the sum of $5000.00 is not involved in this

cause but only the sum of $3179.27, the latter being the amount of increase in the Territorial taxes of Oklahoma County caused by the twenty-four per cent increase of the assessed valuation of the property (except railroad property) of said county made by the Territorial Board of Equalization. It is conceded that the total amount of increase of taxes of said county caused by the action of said board (if same is enforced) will greatly exceed the sum of $5000.00, but counsel claims that the proper county and township boards could have reduced the rate of the respective levies made by them so as to cause no increase in the amount of local taxes. No such reductions, however, were made and the time for making them, if it ever existed, had expired long before the commencement of this action; hence, it is clear, that the real amount in controversy is the total amount of the increase of the taxes of said County caused by the action of said board which this suit was brought to enforce. In Davies vs. Corbin, 112 U. S. 36, it is said by Chief Justice Waite, in concluding the opinion of the court, that:—"The value of the matter in dispute is measured by the whole amount of the tax and not by the seperate parts into which it is to be divided when collected. It is conceded that the amount of tax is more than $5000." The amount in controversy in the case at bar is not to be determined by what might have been but was not done by strangers to this action. Furthermore, the position of counsel for defendant in error assumes that said board's action in making the increase of the assessed valuation of said county is valid and, therefore, should not have been resisted which is the very matter in dispute. Again it is

shown by the affidavit of Anna G. Caffrey, Deputy County Clerk, (see appendix) in support of motion for supersedeas, that $4480.90 of said increased amount of taxes will arise from the levy of taxes for school purposes made by the board of education of Oklahoma City under the provisions of section 1 of article 7, of Chapter 34, of the Oklahoma Session Laws of 1897 which reads, in part, as follows:—"That the board of education shall, on or before the 15th day of June of each year, levy a tax for the support of the schools of the city of the first-class for the fiscal year next ensuing, not exceeding in any one year fifteen mills on the dollar on all taxable property within the school district which is taxable according to the laws of the Territory of Oklahoma." Also that $1,044.72 of said amount will arise from the levy made by the superintendent of public instruction of said county under the provision of article 1 of chapter 45 of the Oklahoma Session Laws of 1895, which are, in part, the following:

"SECTION 1. It shall be the duty of the county superintendent, on or before the first day of April, 1895, in each county in this territory, to audit any outstanding indebtedness that may have been contracted prior to March 14th, 1893, by any original township school board, and apportion the same to the territory, formerly comprising said school township.

"SECTION 2. The last assessment returns of property subject to taxation within said school townships shall be the basis for estimating a levy to pay said indebtedness.

"SECTION 3. It shall be the duty of the county superintendent at the same time to certify to the

county clerk a special levy in addition to the annual levy athorized by law on said property sufficient to pay said indebtedness, provided such special levy shall not exceed five mills in any one year, and the county superintendent shall continue to certify such levies as aforesaid from year to year, as provided herein, until such indebtedness is fully paid.

"SECTION 4. It shall be the duty of county clerk to extend such levies on the tax rolls of the county in the same manner as is provided for other tax levies."

These two levies were made on June 15th, 1898 and April 1, 1898 respectively, while said Territorial board of equalization did not and could not (legally) meet until Monday, June 20, 1898, See Article 1, Chapter 43, Oklahoma Session Laws 1895, and did not make the order increasing the assessed valuation of Oklahoma and all but two of the other counties of the Territory until June 27, 1898. It is certain then that there could have been no legal reduction in either of said two levies after said increase in the assessed valuation was made by the Territorial board and the aggregate amount of increased taxes in these two levies alone, caused by the action of the said board, is $5,525.62, considerably more than the amount necessary to confer jurisdiction upon this court.

Where an appeal or writ of error has been allowed by the lower court and the proof in this court leaves the matter in doubt, a motion to dismiss for lack of jurisdictional amount will be denied. Rector vs. Lipscomb, 141 U. S. 557; Gage vs. Pumpelly, 108 U. S. 164. In the case at bar, however, the proof, to show jurisdictional amount, is overwhelming; consequently

the court will encounter no difficulty on this question, Micas vs. Williams, 104 U. S. 556.

Counsel next suggests that the judgment of the Territorial Supreme Court should be affirmed because the record herein shows that the writ of error was sued out and appeal taken for delay only, that the defense set up by plaintiff in error in the lower court is frivolous and that the matters there pleaded by him as a defense were finally decided adversely to his claim by the Territorial Supreme Court on the rehearing in Wallace v. Bullen, 6 Ok. 757, which decision was not appealed from. Plaintiff in error herein was not a party to the case just cited and can be bound by nothing therein decided and it is wholly immaterial to his rights whether or not the losing party to that case appealed to this court, even if it be conceded that said case presented such jurisdictional facts as to authorize an appeal.

The cases cited by counsel for defendant in error in his fourth ground of objection to the allowance of motion for supersedeas, instead of showing the controverted question in this cause to be frivolous, show precisely the contrary. The peremptory writ of mandamus granted and issued in this case was not based upon a previons judgment rendered in a case between the same parties so as to fall within the principles declared in Chanute v. Trader, 132 U. S. 210. That the case at bar is one which may properly be reviewed in this court, in addition to the authorities cited at page 16 of plaintiff in error's motion for supersedeas, see Columbian Ins. Co. v. Wheelright, 7 Wheat. 534, wherein it is held that:—"A writ of

error will lie from this court upon the judgment of the circuit courts, awarding a peremptory mandamus." But, even if the motion of defendant in error to dismiss and affirm were meritorious, it is not so presented as to entitle it to consideration by this court. Cary v. Houston & F. C. R. Co. 150 U. S. 168; Texas Land & Cattle Co. v. Scott, 137 U. S. 436; Crane Iron Co. v. Hoagland, 108 U. S. 5; City of Waterville v. Van Slyke 115 U. S. 290; see also subdivision 4 of rule 6 of this court.

Respectfully submitted,

JAMES R. KEATON,
For Plaintiff in Error.

APPENDIX.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

RICHARD F. CAFFREY, County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error, APPELLANT.

vs.

TERRITORY OF OKLAHOMA, ex rel, Harper S. Cunningham, Attorney General, Defendant in Error, APPELLEE.

Supplemental Additional Showing in Support of Motion for Supersedeas.

Territory of Oklahoma, } ss.
County of Oklahoma, }

Anna G. Caffrey, of lawful age, being first duly sworn says she is the Deputy County Clerk within and for said above named County; that she has examined the books and records of said clerk's office and made a careful calculation from the matters therein contained for the purpose of ascertaining the amount of

increase in the district school taxes of Oklahoma City, said County and Territory, caused by the increase in the assessed valuation of the property of said County made by the Territorial Board of Equalization and finds said amount to be about Four Thousand Four Hundred and Eighty Dollars and Ninety Cents ($4,480.90).

Affiant further states that said Oklahoma City is a city of the first class and that the levy of taxes therein for school purposes is made by the Board of Education thereof, as provided by section 15, of article 7, of chapter 73, of the statutes of Oklahoma, 1893. as amended by section 1, of article 7, of chapter 34, of the Oklahoma session laws of 1897, and that the levy of taxes for the support of the schools of said city for the fiscal year beginning July 1, 1898, was made by the said Board of Education on the 15th day of June, 1898, and was certified by the clerk of said Board of Education to the County Clerk of said County.

Affiant further says that she has, from said records, made a careful estimate of the amount of increase of the Township school taxes levied by the Superintendent of Public Instruction of said County, under the provisions of article 1, of chapter 45, of the session laws of 1895, caused by the said increase of the assessed valuation of the property of said County, made by the said Territorial Board of Equalization, and finds said amount to be about One Thousand and Forty Four Dollars and Seventy Two cents; also that said levy was made by said County Superintendent of Public Instruction on the First day of April, 1898, and that same was based upon the 1898 assessment of the property of said County.

Affiant further states that in making the above and foregoing estimates, no account was taken of the railroad property of said County, which said property, as affiant understands, is in no way affected by the said action of the Territorial Board of Equalization.

ANNA G. CAFFREY.

Subscribed and sworn to before me, this 23rd day of January, 1899.

ASA JONES,
Probate Judge.

[SEAL.]

I hereby accept service of the above and foregoing affidavit, on behalf of the above named defendant in error and appellee, by the delivery to me of a full and correct copy thereof, this 24th day of January, 1899.

HARPER S. CUNNINGHAM,
Attorney for Defendant in Error and Appellee.

Office Supreme Court U. S.
FILED
DEC 5 1899
JAMES H. McKENNEY,
Clerk

No. 182.

Brf of Keaton & Flannery for P. & A.

In the Supreme Court

Filed Dec. 5, 1899.

...United States...

October Term, 1899.

RICHARD F. CAFFREY, County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error and Appellant.

vs.

TERRITORY OF OKLAHOMA, Ex Rel. Harper S. Cunningham, Attorney General, Defendant in Error and Appellee.

No. 182.

BRIEF---For Plaintiff in Error and Appellant.

JAMES R. KEATON
and
FRANCIS J. KEARFUL,
For Plaintiff in Error and Appellant.

JOHN S. FLANNERY,
Of Counsel.

CHAMPION PRINT, OKLAHOMA CITY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 182.

Richard F. Caffrey, as County Clerk of Oklahoma County, Oklahoma Territory, vs. The Territory of Oklahoma on the relation of Harper S. Cunningham, Attorney General.	Error to and appeal from the Supreme Court of the Territory of Oklahoma.

STATEMENT OF FACTS.

This is an action of mandamus, commenced on August 13, 1898, by defendant in error, The Territory of Oklahoma, on the relation of Harper S. Cunningham, as Attorney General thereof, against plaintiff in

error, Richard F. Caffrey, as County Clerk of Oklahoma County, Oklahoma Territory, by the filing of a motion, signed by the said Harper S. Cunningham, in the office of the clerk of the Supreme Court of Oklahoma Territory, supported by an affidavit of said Harper S. Cunningham, marked "Exhibit A" to said motion, and a certificate by S. N. Hopkins, Auditor of said Territory and Secretary of the Territorial Board of Equalization, showing the percentage and amount of increase in the assessed valuation of Oklahoma County and the Territorial rate of taxation, marked "Exhibit B" to said motion, the purpose of said action being to compel the defendant below to add to the total assessed valuation of the property of said Oklahoma County (other than the railroad property thereof,) and to the assessed valuation of each tax payer thereof, 24 per centum ordered by the Territorial board of equalization (record pages 2, 3 and 4); that on the 12th day of August, 1898, and one day prior to the filing of the said motion by plaintiff below therefor, an alternative writ of mandamns was issued by Hon. B. F. Burwell, as associate justice of the Supreme court of Oklahoma Territory, in favor of plaintiff below and against defendant below, requiring said defendant to add to the said assessed valuation of the property of said Oklahoma county, the sum of 24 per cent. or to appear before the Supreme court of said Territory on the 1st day of September, 1898, at 10 o'clock, A. M., to show cause why he had not done so (record page 5), and said alternative writ was filed in the office of the clerk of said

Supreme court on the said 12th day of August, 1898, endorsed "writ allowed B. F. Burwell, Associate Justice of the Supreme court of the Territory of Oklahoma" (record page 6); thereafter and on the said 1st day of September, 1898, the defendant below filed in said cause his answer and return to the said alternative writ of mandamus (record page 6); thereafter and on the same date plaintiff below filed its motion to quash said answer and return (record page 16); thereafter and on the 3rd day of September, 1898, the said Supreme court sustained the said motion to quash defendant's said answer and return, and rendered judgment granting a peremptory writ of mandamus against said defendant as prayed for by plaintiff in its original application (record page 16); thereafter and on the 21st day of September, 1898, a peremptory writ of mandamus was issued by the clerk of the Supreme court of Oklahoma, in pursuance of said judgment rendered on said 3rd day of September, 1898, (record, p. 17); thereafter and on the first day of October, 1898, the defendant below filed in said cause a pleading entitled "Return and Reply to Writ of Mandamus," wherein he asked the Supreme court of Oklahoma "to set aside its decision, judgment, order, and writ of peremptory mandamus," (record, p. 19); thereafter and on the 2nd day of November, 1898, the said Harper S. Cunningham as attorney general of Oklahoma, filed in said cause an application on behalf of plaintiff below for a citation to defendant, Caffrey, requiring him to show cause why he should not be punished as for contempt of court for

failing, neglecting and refusing to comply with the requirements of said peremptory writ of mandamus, (record, p. 22); thereafter and on the 22nd day of November, 1898, the citation prayed for by the said attorney general was granted by Hon. John H. Burford, Chief Justice of the Supreme Court of Oklahoma (record, p. 23); thereafter and on the 23rd day of November, 1898, the said citation was issued by the clerk of the Supreme court of Oklahoma and was served on defendant, Caffrey, on the 28th day of November, 1898, (record, p. 24); thereafter and on the 2nd day of December, 1898, defendant, Caffrey, filed in said cause his answer and return to said rule or order to show cause (record, p. 25); thereafter and on the same date a hearing was had upon defendant's answer to the peremptory writ of mandamus and application for rehearing of said cause and the same was overruled by the said Supreme court; thereafter and on the same date said court also overruled defendant's answer and return to the said rule and citation to show cause; and thereupon committed defendant to jail as for contempt of court and until he should comply with the requirements of said peremptory writ of mandamus; thereafter and on the 4th day of January, 1899, defendant below brought said cause into this court both by writ of error and appeal.

The principal legal proposition involved in this case requires a determination of the question whether or not the Territorial Board of Equalization of Oklahoma, consisting of the Governor, Secretary and Auditor

thereof, is vested with the power and jurisdiction by the provisions of Article [1], Chapter [43], of the Session Laws of 1895, to increase, arbitrarily and without competent evidence or regard for uniformity, not only the assessed valuation of a county, but the aggregate assessed valuation of all the counties of said Territory. The statute just referred to, in so far as it is strictly applicable to the question involved reads as follows:

> "The governor, territorial auditor and secretary, shall constitute the territorial board of equalization, and said board of equalization shall hold a session at the capital of the territory, commencing on the third Monday of June of each year; and it shall be the duty of said board to examine the various county assessments and to equalize the same, and to decide upon the rate of territorial tax to be levied for the current year, together with any other general or special territorial taxes required by law to be levied, and to equalize the levy of such taxes throughout the territory. And shall therefrom find the per centage that must be added to or deducted from the assessed value of each county, and shall then order the percentage so found to be added to or subtracted from the assessed values of each of the various counties of the Territory, and shall notify the various county clerks of the percentage so ordered to be added to or substracted from the valuation of property in their respective counties. It shall then be the duty of the various county clerks to add to or deduct from, the total value of the property assessed to each party, the percentage so ordered, and collect the taxes accordingly."

The material facts, as shown by the pleadings in this case, presenting the question stated are the following:

On June 27, 1898, a majority of the members of the Territorial board of equalization, to-wit: The governor and auditor of said Territory, met in pursuance of a former adjournment, as such board of equalization, and by order, increased the aggregate assessed valuation [not including railroad property] of all the counties of Oklahoma from $29,404,279.00, as shown by the abstracts of the assessment rolls certified to said board by the county clerks of all the counties, to the sum of $38,213,784.00, thereby increasing the assessed valuation of the different counties from three, to eighty-six per cent. except the counties of Greer, which was reduced 3 per cent. and Pottawatomie, which was neither increased nor decreased; the county of Oklahoma, wherein plaintiff in error was on said date and still is the duly and legally elected and qualified county clerk, was increased by said order 24 per cent. on an assessed valuation of $3,080,695.00, making an increase thereof in the sum of $739,366.00 [record, pages 7 to 10]; that said order was made by said Territorial board of equalization without any competent or sufficient evidence and without other evidence than the abstracts of the assessment rolls certified to said board by the county clerks of the various counties of said Territory, the statute requiring said abstracts to be so made and certified to said board being Sec. 4, Art. 6, Chap. 70, [Gen. Sec. 5623], Ok. Stat. 1893, and reads as follows:

"As soon as practicable after the assessment rolls are equalized and corrected, as provided in the two preceding sections, and before the third Monday in June next ensuing, the county clerk shall make out an abstract thereof containing:

Whole number of acres of land listed in the county and the total value thereof.

Total valuation of town lots.

Amount of property invested in merchandise.

Amount of property invested in manufactures.

Number of horses and their total value.

Number of mules and asses and their total value.

Number of cattle and their total value.

Number of sheep and their total value.

Number of swine and their total value.

Number of carriages and vehicles of every kind and their total value.

Total value of money and credits.

Total value of household furniture.

Total value of stocks or shares.

Total value of all other personalty not enumerated under the foregoing heads; and

Number of polls.

Which abstract the clerk is directed to transmit without delay to the auditor of the Territory and the county commissioners are authorized to direct the clerk to add to the above list of items such other items as they may deem advisable. And it shall be the duty of the Auditor of the Territory to furnish such forms for the use of the county commissioners, assessors, clerks and other officers of the revenue, as shall secure uniformity of proceedings and returns throughout the Territory."

Copies of the abstracts of said assessment rolls for Pottawatomie and Oklahoma counties are set out in full in the record herein (record pages 11 to 14 inclusive); "that the valuation placed upon all the taxable property of the said county of Oklahoma, as shown by the assessment roll certified by" plaintiff in error herein, to the secretary of said Territorial board of equalization, was and is the fair and true cash value of all said property, and that said valuation was equally as high as (and in some instances higher than) that of the same classes of property of the said Pottawatomie county; "that a large portion of the property so assessed and valued for taxation in said county of Oklahoma and whose valuation was so increased to the extent of 24 per centum thereof by the Territorial board of equalization consists of money;" that plaintiff in error, defendant below, offered to introduce proof in support of the issues of fact raised by his answer and return to the alternative writ of mandamus and especially to show that the valuation of the taxable property of said Oklahoma County (other than the railroad property thereof), as shown by the said abstract of the assessment roll of said county, was as high as or higher than the same or similar classes of property of said Pottawatomie county, and that said defendant demanded a trial of said issues by jury, "that the pretended order of the said territorial board of equalization in assuming to increase the valuation of all the taxable property of Oklahoma county and the other counties of the Territory, other than the railroad property thereof, was made without any notice to any of the county officers or tax-

payers of said counties and without affording any opportunity to any one in behalf of any of said counties to appear before said board and have a hearing upon the question of whether or not the orders of said board increasing the valuations of the property of said Oklahoma and the other counties of the Territory for taxation was, in any respect, fair, just or equitable" (record page 8); that the rates of the Territorial taxes for the purposes authorized by law were fixed by said board as follows:

> For general revenue, 3 mills on the dollar.
>
> For current university fund, .5 mills on the dollar.
>
> For current normal school fund, .5 mills on the dollar.
>
> For bond interest fund, .2 mills on the dollar.
>
> For education of the deaf and dumb, .5 mills on the dollar.
>
> For the education of the blind, .3 mills on the dollar. (record page 3.)

Richard F. Caffrey, defendant below, as a part of his petitions for writ of error and appeal, has assigned the following errors, towit:

> "First. The court erred in sustaining the demurrer to (or motion to quash) the return of this defendant to the alternative writ of mandamus issued in this cause.
>
> Second. The court erred in not carrying said demurrer back and sustaining same to said alternative writ of mandamus.
>
> Third. The court erred in not carrying said demurrer back and sustaining same to the motion and application filed in said cause asking

for the issuance of the alternative writ of mandamus.

Fourth. The court erred in rendering judgment upon the pleadings in favor of plaintiff and against this defendant after having sustained said demurrer to defendant's said return to the alternative writ of mandamus.

Fifth. The court erred in allowing and ordering a peremptory writ of mandamus in favor of said plaintiff and against this defendant.

Sixth. The court erred in overruling and denying defendant's return and reply filed herein on October first, 1898, to the peremptory writ of mandamus issued out of this court on September 21st, 1898, and in refusing to set aside its decisions, judgment, and order granting said peremptory writ of mandamus." (record, page 30).

ARGUMENT.

I.

The Supreme Court of Oklahoma erred in interpreting the provision of the statute creating the territorial board of equalization and prescribing its duties so as to authorize its making any material increase in the aggregate assessed valuation of all the counties of the Territory.

The language of the statute is, "and it shall be the duty of said board to examine the various county assessments and to equalize same, * * * and shall therefrom find the percentage that must be added to or deducted from the assessed valuation of each county. "Sec. 1, Art. 1, Chap. 43, Okl. Session Laws 1895, (supra page 5). In construing this language the court should, of course, take into consideration the object of its enactment, the consequences that may reasonably be expected to follow the particular interpretation given and the materials furnished said board of equalization upon which to base its action. For the purpose of equalizing the various county assessments this board is only provided with abstracts of the assessment rolls of said counties and these need only contain the statement required by Sec. 5623, Okl. Stat. 1893, (supra, page 7). Thus it is seen that this board has before it only the assessed valuations of all the counties of the Territory and must, by the terms of the statutes, equalize these

valuations by adding to or deducting from each such percentage, if any, as may be necessary for that purpose. We insist that the only reasonable interpretation to be given the language of this statute is to hold that said board must equalize the valuations furnished it in such manner as not to increase or decrease, materially, the aggregate of all these valuations. In other words, it must, in performing the functions of a board of equalization, under the provisions of said statute, deal with the valuations already furnished and not attempt to create new ones. As held by a majority of the Oklahoma Supreme Court in Gray vs. Stiles, 6 Okla. 455, 49 Pac. 1083:

> "Assessment is the same as valuation of the property taxed. This assessment and valuation must be made by the officer or officers to whom it is by the statute expressly committed. The duty and function of assessment cannot be shared in by any officer to whom it is not so granted by the express language of the statute. Equalization of property is a wholly different matter, comprehending as it does simply the ascertainment of the average of the valuations already found. It is the equalizing of individuals among each other by the township boards, and of the townships among each other by the county boards, and of the counties among each other by the territorial board of equalization. It is, in the present case, the aggregate amount of property having been ascertained by the abstract of assessment rolls furnished to the auditor of the Territory from the various counties, an ascertainment of the proper percentage which

should be added to some counties and taken away from others to place the counties upon an equal footing; the aggregate amount of property remaining the same, except from such slight raising or lowering of the amounts as may be incidental to the operation of equalization ofthe taxes among the various counties."

The proper interpretation to be given this statute is concisely stated by Mr. Justice Bierer in his concurring opinion in the same case (49 Pac. 1106), as follows:

"The territorial board of equalization is clothed purely and solely with the power of equalization of assessments, and not with the power to change valuations. It must take the valuations as returned by the county clerks, and has, in my judgment, no power whatever to change such valuations. So far as the territorial board of equalization is concerned, it makes no difference whether the assessments have been made, as they should be made, at the actual cash value of the property, or whether they have been upon a basis greater or less than that. The statute makes it the Board's duty "to examine the various county assessments and to equalize the same." The terms of this language is the sum total of its power with reference to equalization. It is to examine the county assessments. It has no power to examine anything else, nor to hear anything else, nor to review anything else, nor to decide from any other matter presented than the county assessments, and it must then equalize, and not re-assess, the same. The statute is most complete and comprehensive in defining the mode and manner of making the assessments. The individual

must give in his property under oath, and the assessing officer must also swear to the correctness of the valuations. The territorial board of equalization does not have the responsibility of determining the correctness of the valuations of the property. It hears nobody's statement under oath, and makes none of its own, and it is not presumed to know anything more about these valuations than the man who owns the property, or than the legal assessor who has imposed upon him the particular responsibility of ascertaining what these valuations are."

It has been held by a majority of the Supreme Court of Oklahoma in Wallace vs. Bullen, 6 Okla. 17, 54 Pac. 974, and several cases following it, that the legislature intended to confer jurisdiction on the Territorial board of equalization to change the assessed valuations of counties and the aggregate valuation of all the counties for the purpose of making them conform to the "true cash value" of the property assessed. This position is, we think, wholly untenable, as neither the language of the statute nor the means provided the board upon which to base its action justifies such interpretation. (Gray vs. Stiles, supra, and cases therein cited.)

In many states, the state board of equalization is expressly required to raise or lower assessments to the true or actual cash value of the property, but, wherever this power is given such boards, they are also provided with ample means for ascertaining such value. The Oklahoma board is neither required to ascertain and fix the true cash value of the property nor furnished any

means whatever for doing so. The duty of fixing the valuations of the property assessed for taxation in Oklahoma is specifically imposed upon other officers than the members of the Territorial board of equalization, whose duty in this regard, is simply "to examine the various county assessments and to equalize same." It is well settled that a board of equalization "can only exercise such powers as are expressly granted by statute." (Sioux City and Pac. R. R. vs. Washington County, 3 Neb. 30.)

Our contention as to the proper interpretation to be given the statute in question is materially strengthened by reference to other provisions of the revenue laws of Oklahoma. Section 4, Art. 2, Chap. 70 (Gen. Sec. 5583) Okla. Stat. 1893, provides that all property, both real and personal "shall be listed and assessed each year in the name of the owner thereof," etc. In Sec. 5 (5584) Id., it is provided that:

> "The list shall be signed and sworn to by the persons making it, and the oath thereto may be administered by the assessor or his deputy, or by any other officer authorized to administer oaths, and shall be certified by him, and the oath may be printed upon the blank form and shall be in substance as follows:
>
> I, A B, do solemnly swear, (or affirm) that I have listed above and within, all the lands, town and city lots, personal property, money and credits subject by law to taxation and owned, used, possessed or controlled by me, or by law required to be listed by me for any other person or persons as guardian, husband, parent, trustee, executor, administrator, receiver, ac-

counting officer, partner, factor, bailee or agent, according to the best of my knowledge."

Section 6, (5585), is in the following language:

"In case any person required to render the list under oath fail or refuse to do so, the assessor in order to perform his duty as required in section 5580 shall list the property of such person and as a penalty shall add fifty per cent to the actual value thereof and he may examine on oath any person whom he supposses to have knowledge in relation to the property required to be listed; and if any such person refuse to testify when so required, he shall forfeit the sum of five dollars, to be recovered in civil action in the name and to the use of the proper county; and the assessor shall make a minute of the names of persons refusing to swear to such list or to testify in relation to property, and shall note the same on the list and return the same to the board of county commissioners."

Section 8, [5587], is as follows:

"The assessor shall take and subscribe an oath to be certified by the officer administering it, and attach it to the assessment roll, which oath is to be in substance as follows:

"I, A. B., county or township assessor, in and for.....County, Oklahoma Territory, do solemnly swear or affirm, that the value of all property, moneys and credits, of which a statement has been made and verified by the oath of the person required to list the same, is hereby truly returned as set forth in such statement; that in every case where I have been required to ascertain the amount of value

of the property of any person or body corporate, I have diligently and to the best means in my power endeavored to ascertain the true amount of value; and that, as I verily believe, the full value thereof is set forth in the above returns. And that in no case have I knowingly omitted to demand of any person of whom I was required to make it, a statement of the amount and value of his property which he was required by law to list, nor have I connived at any violation or evasion of any of the requirements of the law in relation to the assessment of property for taxation."

Section 9, (5388) reads as follows:

"If any person shall wilfully make or give under oath or affirmation a false list of his, her, or their taxable property, or a false list of the taxable property in the use or possession or under the control of him, her or them, and required by law to be listed shall be deemed guilty of perjury and upon conviction thereof, shall be punished therefor as is by law provided for the punishment of perjury."

Section 10 (5389) provides among other things that:

"Every inhabitant of this Territory, of full age and sound mind, unless excepted by the provisions of this act, shall list all property subject to taxation in this Territory of which he is the owner or has the control or management in the manner herein directed."

The foregoing statutory provisions, together with others quoted in Gray vs. Stiles, supra, show conclusively, we think, that the legislature never intended to

authorize the Territorial board of equalization to change the assessed valuations of the counties for the purpose of making same correspond with the actual cash value of the property assessed. In discussing this question, the writer, in his concurring opinion in Gray vs. Stiles, supra (49 Pac. 1101), used the following language, which we here adopt, to-wit:

> "I heartily agree with what is said in the foregoing opinion as to its being utterly impossible, under the law, for the territorial board of equalization to ascertain the true or actual value of any classes of property except that which it is said board's duty to assess. This position is made perfectly apparent by the provisions of Article 4, Chap. 43, Sess. Laws 1895, which make it the duty of said board "to assess all the property of the railroads and railroad corporations in the Territory of Oklahoma at its actual cash value"; and, in order that said value may be ascertained, "every person, company or corporation operating or constructing a railroad in this territory" is required to "return sworn lists or schedules of the taxable property of said railroad company or corporation as hereinafter provided." It is then specifically provided in section 5 of said article how and by whom these lists or schedules shall be made, what they shall contain, etc. It will suffice here to say that said lists or schedules shall contain a sufficient statement of the amount, character, and value of such railroad property to enable said board to determine almost (if not quite) definitely, the actual cash value thereof. Then, in section 7 of said article, it is further provided that, if the pro-

per officers fail to make the required statements or schedules, the person, company, or corporation owning such railroad property "shall forfeit, as a penalty, not less than five thousand dollars for each offense," etc. It is still further provided in section 8 of said article that the board of railroad assessors shall have the power to compel the attendance of the officers and other agents of a railroad company as witnesses to testify before said board concerning any necessary matters to enable said board to properly assess such property, and that "any president, secretary, receiver, accounting officer, servant or agent of any railroad company, who shall knowingly make any false answer to any question put to him by such board or by its order, touching the business, property, money and credits and value thereof, of said railroad company, shall be guilty of perjury, and it shall be the duty of the president of said board to prosecute any person liable to the penalties of this section immediately upon the accruing of the liability of such prosecution." How, then, can it be asserted that the legislature, which understood that all of the foregoing provisions were necessary to enable these officers, when acting as the board of railroad assessors, to determine the actual cash value of the railroad property of the territory, could [redacted] possibly have intended that said officers, when acting as the territorial board of equalization, should assume to fix the actual cash value of the other property of the territory at a different amount from that fixed by the various assessors thereof, as equalized by the township and county boards of equaliza-

tion, without any means whatever for ascertaining same except abstracts of the assessment rolls of the different counties? * * * If this court holds that said board of equalization has the power to raise the aggregate valuation of the taxable property of the territory as shown by the abstracts of the assessment rolls of all counties, by a parity of reasoning we must also hold that it is vested with the power to reduce said aggregate valuation; and, so far as the writer can discern, there will be no adequate means of correcting the action of said board, no matter to what extent it may in the future increase or decrease such aggregate value. It certainly will not be contended that a taxpayer can maintain a proceeding in court to review and correct the action of said board in this regard upon the sole ground that his property has been overvalued thereby, and, as there is no appeal therefrom, I can see no possible remedy, if this power is conceded that the taxpayers of the territory would have to correct such action, should the territorial board of equalization increase the aggregate valuation of their property to twice, or even many more times, its "true cash value." On the other hand, I can see no means with which to review and correct the action of said board should it decrease the valuation of the property of the territory to one-half, or even a less proportion, of its "true cash value." Can it be possible that the legislature ever intended to invest this body with such tremendous powers, to be exercised without the right of a hearing on the part of those affected thereby, by providing simply that "it shall be the duty of said board to examine the various

county assessments and to equalize same"?

No argument is necessary to show that if said board has the power to materially change such aggregate, it has the power to re-assess the taxable property of the Territory. The dangers which must, almost necessarily, follow the exercise of such a power are clearly pointed out by the Supreme Courts of Colorado and Montana in the cases of People vs. Lathrop, 3 Colo. 428, and State vs. State Board of Equalization, 46 Pac. 266, wherein it is held that:

> "If this claim of power on behalf of the State board to increase the valuation be admitted, why limit in the constitution the per cent that it may levy? It matters little whether the limitation be one mill or ten, if increase of valuation be unrestrained. Limited upon the one hand, it is unlimited upon the other. We may neither calculate its extent nor challenge its pretentions. Over five million dollars increase this year, it may be over fifty million dollars increase next year. Under this construction of the statute the efforts of the people to establish and maintain legitimate restraints on the power to tax will have been unavailing and the checks and guards which they have embodied in their constitution to that end cease to be of practical force or value. (See also Paul vs. Pacific R. R. Co. 4 Dill., 93.)

Similar limitations to those contained in the Colorado and Montana constitutions, as to the rates of tax levies, have been enacted by the Oklahoma Legislature. See Secs. 1 and 3, Art. 2, Chap. 42, Session Laws 1895, which read in part as follows:

Section 1. "The rate of general Territorial tax shall not be less than one-half mill nor more than three mills on the dollar valuation, and in addition one-half mill each year for the erection and support of a Territorial normal school and one-half mill each year for the erection and support of a Territorial university, and such levies for county purposes as are hereinafter provided, to be apportioned to the different funds as hereinafter provided, and such other taxes as may be authorized by law."

Section 3. "The levies for county purposes shall be a separate, specific and sufficient levy for the payment of salaries, a levy for court purposes not exceeding three mills; for support of the poor, including insane, not exceeding two mills; for roads and bridges not exceeding two mills; for county supplies, not exceeding three mills."

In this connection we call special attention to the fact that said board fixed the rates of the levies for the different Territorial taxes at the maximum allowed by law. (Record Page 3, supra page 9.) What possible benefit or protection to the tax-payers of Oklahoma is afforded by the limitations upon the power of said board in fixing the rates of said levies, contained in Sec. 1, Art. 2, Chap. 43, Session Laws 1895, if it has the power to increase, arbitrarily, the aggregate assessed valuation of all the counties of said Territory? The record in this case shows that this board, at its meetings in June, 1898, increased such aggregate assessed valuation from $29,404,277.00 to $38,213,784.00. Any argument which will sustain said board's action

in making this increase of $8,809,505.00 must also concede it the power to make an increase of any greater amount which a majority of its members may, arbitrarily, decide upon. We say "arbitrarily" because it can act in no other way when it assumes to change assessed valuations, for the reason that it is not provided with sufficient means to enable it to act *quasi* judicially, justly, or intelligently in this regard; and, as shown by its own records, the action sought to be enforced in this case was not for the purpose of equalizing the assessed valuations of the different counties for the purpose of making the assessments of said counties conform to the "true cash value" of the property listed, but was, we claim, solely for the purpose of raising a greater amount of revenue. The only reason assigned by it for making this increase is the following:

> "From the computations made by the secretary of the board it was found necessary to make the following changes in the county returns reported to the board, and on motion such changes were ordered to be made, to-wit:" (Record Page 9).

What the basis or purpose of this computation was the records of the board wholly fail to show.

II.

The action of said Territorial board of equalization in increasing the assessed valuation of all the taxable property (other than railroad property) of Oklahoma and all the other counties of the Territory, except Greer and Pottawatomie, works a violation of that portion of Sec. 6, of the Oklahoma organic act prohibiting "any unequal discrimination * * * in taxing different kinds of property" and requiring that "all property subject to taxation shall be taxed in proportion to its value."

For the sake of argument and to be entirely fair, let us suppose that the secretary of this board assumed to base his computation upon the abstracts of the assessment rolls of all the counties of Oklahoma, then we contend, not only that these abstracts do not state sufficient facts to serve as a basis for such computation, but also that the board's action in making the increase of the assessed valuation of Oklahoma and the other counties is violative of that portion of Sec. 6, Oklahoma organic act, providing that no "unequal discrimination shall be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value." (26 Stat. 84).

As already stated, the record in this case contains complete copies of the abstracts of the assessment rolls of Pottawatomie and Oklahoma counties. (Record pages 11 to 14). It appears that the assessed valuation of Pottawatomie county was selected as the standard by which to regulate that of each of the other counties, as it was neither increased nor decreased by said

board. A comparison of these two abstracts of assessment rolls fails to show any justification for increasing the assessed valuation of Oklahoma county by twenty-four, or any other per cent. As disclosed by an examination thereof, the number of head or articles and their average value, as well as their total value, of only a few classes of personal property, are given in each of these two abstracts. The first two classes of property listed on each abstract are: 1. Horses. 2. Mules and asses. The average value, per head, of horses, as shown by the Pottawatomie county abstract is $14.87 and the average value, per head, of horses as shown by the Oklahoma county abstract before the increase made by the board is $14.50. The average value, per head, of mules and asses as shown by the Pottawatomie county abstract is $25.59, and the average value, per head, of mules and asses as shown by the Oklahoma county abstract is $17.73. By raising the assessed value of these two classes of property twenty-four per cent in Oklahoma county, the board increased the average assessed value of horses in said county to $17.98, per head, thus making the average value of horses in Oklahoma county more than twenty-one per cent greater that of Pottawatomie county, while the average value of mules and asses in Oklahoma county, with the increase, is only $21.99, per head, or nearly seventeen per cent less than the average value, per head, of the same class of property in Pottawatomie county; thus it is seen that even in classes of property where the number and average value are given, the said twenty-four per cent increase has little, if any, tendency toward the equalization of values, even if we assume that such classes of property in these two counties are substantially of the

same size and quality and therefore of the same value; but how could this board, with nothing before it but the abstracts of assessment rolls, simply showing the number, average value and total value of horses listed for taxation in these two counties, determine that, in reality, the average value thereof was the same in each county? Class number 2 really includes two classes, to-wit: Mules and asses, and there was nothing before the board to show the number of mules or the number of asses listed for taxation in either of these two counties or any other county as it is evident that the abstracts of the assessment rolls of the other counties are in substantially the same form. It certainly cannot be assumed that the average value of asses is the same as that of mules, then how could the secretary of this board ascertain, by computation, that the value of class No. 2 of Oklahoma county should be raised 24 per cent?

Again, in a large majority of the classes of personal property listed on said abstracts, neither the number nor average value of the articles embraced within such classes is given and, in fact, in many of said classes, could not be given; for instance, class 14, on both abstracts, is "household furniture" and the aggregate value of same, as shown on the Pottawatomie county abstract, is $45,281.00 and on the Oklahoma county abstract is $63,041.00, and just how the secretary of said board could, by any computation based on these abstracts, ascertain that the assessed valuation of household furniture in Oklahoma county should be raised twenty-four per cent, although it already exceeded that of Pottawatomie county by $18,760.00 is some-

what difficult for the average mind to comprehend. The same suggestions are applicable to nearly all the classes from 14 to 31 inclusive, and which, for convenience, we here set out in parallel columns:

	Pott. Co.	Okla. Co.
15. Interest on bonds of the United States		
Bar fixtures		$ 2,460.00
16. Teritorial and other bonds	$ 100.00	
17. Stocks in any company or corporation, current rate	20.00	
18. Moneys $16,568		
19. Credits, actual value, 802	17,370.00	31,175.00
Bicycles	153.00	
20. Average value of merchants' stock for preceding year	133,664.00	263,991.00
21. Average value of merchants' moneys and credits for preceding year	12,065.00	
22. Average value of manufacturers' stock for preceding year	8,717.00	
23. Average value of manufacturers' moneys and credits for preceding year		
24. Shares in any vessel or boat		
25. Mortgages and all other securities	4,907.00	71,044.00
26. Promissory notes and accounts	14,137.00	14,263.00
27. Tax-sale certificates	59.00	311.00
28. Judgments		175.00
29. Shares in national banks	58,430.00	36,000.00
30. Improvements on unentered lands or lots not deeded	75,848.00	50,913.00
Grain on hand	1,698.00	
31. Aggregate value of all other property	38,688.00	78,046.00

It is also probably worthy of observation that the total assessed valuation of the personal property of Oklahoma county before the 24 per cent increase, exceeded that of Pottawatomie county by $25,812.00. We wish, here, to call special attention to the fact that the aggregate assessed valuation of moneys and credits in Pottawatomie county is only $17,370.00 while that of Oklahoma county for the same classes of property is $31,175.00, hence the great skill of the secretary of said board, as a mathematician, must be admitted, if he succeeded, in satisfactorily showing either that each dollar listed for taxation in Oklahoma county was, in fact, worth $1.24, or that the tax-payers of Oklahoma county failed by 24 per cent to list for taxation the full amount of dollars owned by them. In the case of State vs. Thomas (Utah) 50 Pac. 615; being the only case strongly relied upon by a majority of the Supreme Court of Oklahoma as supporting their decision that the Territorial board of equalization has the power and jurisdiction to increase, arbitrarily, the assessed valuation of any county and the aggregate assessed valuation of all the counties, it is said:

> "The statute not having been pursued, the order was defective. It was also defective because it included money in its operation. It clearly cannot be held operative as to money, for, as appears from the record, each dollar of the relators, on the assessment roll, is valued at a dollar; and, when money is so valued, no board or officer can add 5 per centum or any per centum to it. This is so under the constitution, which makes money the standard of valuation for all

taxable property. The value of all property, however, cannot be determined in the same way. Because of its dissimilarity, the process by which the judgment is formed must vary, and probably as to all property, except money, perfect equality in valuations and assessments is unattainable, owing to the fallibility of the human judgment. The value of a dollar may be determined by ascertaining that it is what it purports to be. Porter vs. Railroad Co., 76 Ill. 595. The legal value of a dollar in money is a dollar, and therefore to value and assess it at more than a dollar cannot be a valuation and assesment, "according to its value in money." This being so, the court will take notice, as matter of law, that money cannot be assessed for more than its legal value. Hence, from the nature of things, the said board cannot change the valuation of money on the assessment roll already assessed at its legal value, and thereby make it cease to conform to the mandate of the constitution. People vs. Dunn, 59 Cal. 328. It may be that the failure to except money of itself might not render the order void; but when that fact is considered in connection with the further fact, as shown by the record in this case, that the action of the board did not conform to the statute, the order cannot be upheld as a proper exercise of authority, and is therefore void."

The number of acres of land assessed for taxation in Pottawatomie county for the year 1898, was 52,187, at an average value of $3.00 per acre, making an assessed valuation of lands in said county of $156,561.00, while the total number of acres of land assessed in Oklahoma county for said year was 277,100 at an aver-

age value per acre, before the 24 per cent raise, of $3.71, making a total assessed valuation of lands in said county of $1,030,361.00; thus it is seen that by increasing the assessed valuation of the lands of Oklahoma county by 24 per cent, the disparity, between the average value per acre of said lands and the average value of those of Pottawatomie county, instead of being reduced, was increased by just that much. The Oklahoma county lands may or may not have been more valuable than those of Pottawatomie county, but upon this question, said board had no evidence whatever. Under these circumstances we think it almost self-evident that the action of said board in making this large per centage of increase is in controvention of the provisions of the organic act hereinbefore quoted. Had this board been empowered by the statute creating it and prescribing its duties, to equalize the property of the various counties by classes instead of in bulk the abuses flowing from the attempted exercise of this power might not have been so flagrant. It is held in Dayton vs. Board of Equalization (Or.) 50 Pac. 1909, that any attempted equalization of the assessed valuation of personal property between the different counties without a just and reasonable classification thereof "would increase, instead of diminish the disparity between the values."

The record in that case shows that the personal property of all the counties of the State except the county of Marion, had been divided into appropriate classes and the state board had equalized these classes.

It appears from the tabulated statement that per-

sonal property was classified upon the assessment roll of Marion county under three heads only, to-wit: "Railroad rolling stock," "live stock," and "personal property, except railroad rolling stock and live stock." And in the attempted equalization of the personal property of Marion county with that of the other counties the said State board of equalization "added 10 per cent to the aggregate valuation of live stock." It was the duty under the statue, of said board to equalize the personal property of the different counties of the State by adding to or deducting from the aggregate valuation of the several kinds or classes thereof so as to make them conform to their true cash value. The constitution of said State requires uniformity and equality in the rate of assessment and taxation. In concluding upon this question the Oregon Supreme Court said:

> "Horses and mules may have been valued relatively lower in Marion than in Baker and Benton, and cattle, sheep and goats, and swine very much higher; but, by a comparison with live stock in the other counties of the state,—and this is the only way by which relative values can be determined,—it may appear that live stock in Marion is assessed too high, which would necessitate a reduction thereof by the requisite percentage; but this would actually reduce the valuation upon horses and cattle in Marion county, which is already relatively lower than its kind in Baker and Benton, so that the process would increase, instead of diminish, the disparagement between the values of horses and mules in Marion and the same class of property in

> Baker and Benton. A method that will produce such a result is radically wrong, and is subversive of the constitutional requirements touching assessment and taxation. There must be uniformity of classification to produce proportional or uniform values among all the counties in the state. This is almost self-evident, and it is needless to discuss the proposition at greater length."

We concede that absolute equality in the assessment of property for the purpose of placing thereon an *ad valorem* tax is impossible and that mere irregularities resulting in slight inequalities in such assessment will not render it void (State Railroad Cases, 92 U. S. 575); but the inequalities caused by the action of the Territorial board of equalization, as shown by the record in the case at bar, are so pronounced and glaring as, necessarily, to bring said action within the inhibition declared by the Organic Act.

As already seen, the Territorial board of equalization must equalize the various county assessments solely from the information disclosed by the abstracts of assessment rolls. Then, in equalizing the assessed valuations of land between the various counties (the average value per acre being shown), the most that this board had power to do was to take the average value of lands in some county as a standard and raise or lower the average value of the lands of each of the other counties to such standard. Admitting that mules in Oklahoma county were valued too low as compared with the valuation placed upon the same class of property in Pottawatomie county, can this afford any justification for raising the valuation of the real estate of

Oklahoma county (already twenty-three and two-thirds per cent higher than that of Pottawatomie county) by 24 per cent?

This court has repeatedly held that different classes of property may be taxed by different methods providing no unjust discriminations are made, but, in the same connection, it is held, "that property of the same kind and under the same condition and used for the same purpose cannot be divided into different classes for purposes of taxation and taxed by a different rule simply because it belongs to different owners." (McHenry vs. Alford, 168 U. S. 651). How can the owners of real estate in Oklahoma county be placed in a different class, for purposes of taxation, from those of Pottawatomie county, except upon the grounds that they (probably) mostly consist of different persons and that their lands are situated in a different county? And these grounds certainly furnish no sufficient reason why the former shall bear a greater burden of taxation in proportion to the value of their property than the latter. (County of Santa Clara vs. Southern Pac. R. R. Co. 18 Fed. 385.)

III

The action of the Territorial board of equalization, as disclosed by the record in this case, amounts to the taking of the property of the tax-payers of all the counties whose assessed valuations were increased "without due process of law."

Fortunately for the tax-paying citizens of the Territories of the United States, they are clothed with the protection to their property guaranteed by article five of the amendments to the Federal Constitution, wherein it is provided that "no person shall be deprived of life, liberty or property without due process of law." It is universally held by the courts that taxation constitutes a branch of the subject of "due process of law," when applied to the question of taking of property, although in the levying and collection of the tax a more summary method of procedure must necessarily be followed than in ordinary suits between parties; but, if the tax be assessed according to value, notice to the owner and an opportunity for him to be heard, at some time after the assessment and before the tax based thereon is collected, is necessary, because the taxing officers, in estimating the value, act judicially or *quasi* judicially.

Paul vs. Pac. R. R. Co., supra.
The R. R. Tax cases, 13 Fed. 722; 8 Sawyer, 270.
County of Santa Clara vs. Southern Pac. R. R. Co., 18 Fed. 385.
Hagar vs. Reclamation District No. 108, 111 U. S. 701.
Davidson vs. New Orleans, 97 U. S. 97.

Spencer vs. Merchant, 125 U. S. 345;
Winona and St. Peter Land Co. vs. Minnesota, 159 U. S. 526.
Maish vs. Territory of Arizona, 164 U,S. 599.
Stewart vs. Palmer, 74 N. Y., 183.
The Sioux City & Pac. R. R. vs. Washington County, 3 Neb., 30.
South Platte Land Co. vs. Buffalo County, 7 Neb., 253.
Dundy vs. Richardson County, 8 Neb., 508.
Slaughter vs. City of Louisville (Ky.) 8 S. W. 917.
People vs. Union, 31 Cal. 138.
St. Joseph Lead Co. vs. Simms (Mo.) 18 S.W. 906.

If the statute fixes a time and place for the meeting of a board of equalization and provides for a hearing, at said time and place, on the part of those who may be aggrieved by its action, no notice is necessary (State Railroad Tax Cases, supra); but, where this constitutional question has been raised and considered, it never has been held, we believe, except, perhaps, by a majority of the Supreme Court of Oklahoma, that such a board may, under the pretense of equalization, re-assess the property within its jurisdiction (thereby greatly increasing the aggregate assessed valuation of said property), without notice of any kind to any person, without the right of a hearing by or on behalf of the property owners, without evidence and without the right of appeal from its decision.

As stated by Mr. Justice Field in the Railroad Tax Cases, *supra*:

> "There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determ-

> ining the value of another's property, according to which it may be taxed, without affording him an opportunity of being heard respecting the correctness of their action. * * * We cannot assent to any such doctrine. It conflicts with the great principles which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty or his property without an opportunity of being heard against the proceeding."

The rule is also clearly recognized and declared by Mr. Justice Brewer, speaking for the court, in Maish vs. Territory of Arizona, *supra*, wherein it is said:

> "Again, it is contended that the board of equalization raised the value of the property of appellants arbitrarily and without notice or evidence. But the testimony does not sustain this contention. The only evidence in respect to the matter was that of a witness, T. A. Judd, who testified that the board of equalization added 6 per cent to the value of stock cattle; but nowhere does it appear that this was done without proof of the value or without due notice to all parties interested. We cannot assume, in the face of the prima facie evidence furnished by the delinquent tax list, that any official failed in his duty."

It was only because the evidence, in the case just cited and quoted from, did not sustain the contention "that the board of equalization raised the value of the property of appellants arbitrarily and without notice or evidence," that the rule was not enforced. In the case at bar, all the allegations contained in the return of defendant below to the alternative writ of mandamus are admitted by the demurrer to (or motion to

quash) said return, and the facts stated in said return, together with the exhibits attached thereto and made parts thereof, show conclusively that the order of the board increasing the assessed valuations of Oklahoma and all [but two] of the other counties was made "arbitrarily and without notice or evidence." [See also the recent case of Pittsburg C. C. & St. L. R. Co. vs. Board of Public Works, 172 U. S. 32.]

The soundness of this rule is practically admitted by the Oklahoma Supreme Court, but its force is sought to be avoided by said court in deciding that any increase of the assessed valuation of property above its actual cash value, is to that extent, illegal and void and that each taxpayer can maintain a separate action of injunction to restrain the collection of any tax based on said increase. Thus it is admitted by said court that the arbitrary and unlimited power, to change assessed valuations, assumed by and conceded to the Territorial board of equalization, may result in injustice and oppression. The court also foresaw that some remedy must be afforded the taxpayers or the power, so conceded, might, in its exercise, amount to partial or even absolute confiscation; hence the holding that each taxpayer may enjoin any increase in his assessment above the actual cash value of the property.

Webb vs. Renfrew, 7 Okla. 198, 54 P. 448;
Bardrick vs. Dillon, 7 Okla. 535, 54, P. 784;
Weber vs. Dillon, 7 Okla. 568; 54 P. 894.)

We will here submit a few of the reasons why the doctrine announced in these cases is unsound:

First. Oklahoma has no statute providing that a taxpayer may invoke the aid of a court of equity simply because his property may have been assessed above its cash value, and the general principles of equity do not authorize the interference of such court on this ground. It is admitted in the opinions of the court in the cases last above cited that, but for special statutory authority, courts of equity in said Territory could not assume jurisdiction on this ground, but it is therein held that such jurisdiction is conferred by Sec. 4143, Okla. Stat. 1893, which reads in part as follows:

> "An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction."

This section provides for the enjoining of a "tax, charge or assessments," only when it or some distinct portion thereof is void, "and any number of persons * * * may unite in the petition filed to obtain such injunction." But the Oklahoma Supreme Court specifically holds that no two or more persons can join in an action of injunction to enjoin the collection of any tax based upon that portion of an assessment which is in excess of the cash value of the property. (Bardrick vs. Dillon; Weber vs. Dillon, supra.) In other words, said court relies on the first portion of this statute for jurisdiction and then annuls the remainder of it. In reality the statute was never intended to confer, upon a court

of equity, the power and duty of ascertaining and fixing the true cash value of property, but was only intended to authorize an action of injunction by all persons within the same jurisdiction whose property is affected by an illegal tax, charge or assessment, or where some distinct and separable part of such tax or assessment is illegal and void. If a tax is partly legal and partly illegal and these two parts are so intermingled that they cannot be separated, then the whole tax will be declared void. (Taylor vs. Thompson, 42 Ill. 9). Of course, a legal tax laid upon exempt property is, as to that particular property, void, and the owners of separate articles or quantities of such property cannot unite in an action to enjoin such a tax levied thereon. This is all that was decided in Hudson vs. County Commissioners, 12 Kan. 140, cited in Bardrick vs. Dillon, supra. And it is specifically held in Stiles vs. City of Guthrie, 3 Okla. 26, also cited therein, that:

> "Several persons, whose property is affected in the same manner by the same illegal tax, may, under our statute, join in an action to restrain the collection of such tax."

It is also said in Bardrick vs. Dillon that:

> "When property is overvalued to such an extent as to raise the presumption that it was overestimated from design a court of equity will determine the true valuations," citing City of Chicago vs, Burtice, 24 Ill. 489; Knapp vs. King county, (Wash). 50 Pac. 480.

But an examination of the cases so cited shows that they do not support the statement just quoted. The decisions in both cases are based on statutes conferring

specific authority upon the courts to examine and correct the assessments and providing an opportunity to all taxpayers, who so desire, to be heard.

Sec. 105, Session Laws, Washington, 1893, contains the following provisions:

> "The court shall examine said list, and if defense [specifying in writing the particular cause of objection] be offered by any person interested in any of said lands or lots to the entry of judgment against the same, the court shall hear and determine the matter in a summary. manner, without pleadings, and shall pronounce judgment as the right of the case may be; or said court may, in its discretion, continue such individual cases, wherein defense is offered, to such time as it may deem necessary, in order to secure substantial justice to the defendant therein. * * * In all judicial proceedings of any kind for the collection of taxes, assessments, and the penalties, interest and costs therein, all amendments may be made which by law, can be made in any personal action pending in such court, and no assessments of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists or assessment roll * * * and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collection of the taxes, not affecting the substantial justice of the tax itself, shall be considered by the court.,'

Sec. 106 reads as follows:

> "Appeals from the judgment of the court may be taken to the Supreme Court at any time

within six months after the rendition of said judgment, on the party praying an appeal executing a bond to the State of Washington, with two or more sureties to be approved by the court, in some reasonable amount to be fixed by the court, conditioned that the appellant will prosecute his said appeal with effect, and will pay the amount of any taxes, assessments, penalties, interest and costs which may finally be adjudged against the real estate involved in the appeal by any court having jurisdiction of the cause."

The Illinois statute is quite similar to that of Washington, but in the case of City of Chicago vs. Burtice, *supra*, it appears that the court held the entire action of the board of equalization void. As before stated there is no provision in the Oklahoma statutes conferring power upon any of the courts to review the proceedings of the Territorial board of equalization, and there is no rule of law better settled than that courts cannot review and correct the action of such a board without specific statutory authority therefor. But, if such action contravenes some provision of statutory or constitutional law, then it will be declared void *in toto* whenever the question of its validity is properly presented either to a court of equity or a court of law, and all persons affected thereby may treat it as an absolute nullity.

Second. The action of the Territorial board of equalization in raising assessed valuations affects all the taxable property of a county (except railroad property) alike, that is, the increase is the same upon all

such property; hence it is apparent that its said action must be valid *in toto* or void *in toto*. The increase made by this board is clearly separable from the previous assessed valuation of the property, and said increase, having been made in such manner as to violate several provisions of organic law applicable to Oklahoma, should be declared wholly void. If courts of equity in said Territory were required, upon application thereto, where property is assessed too high, to reduce the assessment to the actual cash value of the property so assessed, why should they not also be required to increase the valuation thereof where property is assessed at less than its true cash value? If these courts should attempt to assume the jurisdiction of increasing the valuation of all property (assessed below such standard) to its value in money, who would be proper parties plaintiff to invoke the jurisdiction of said courts for such purpose? It is evident that there may be as much discrimination, in the assessment of property, by under valuation as by over valuation and it logically follows that, in as much as the courts of Oklahoma have absolutely no means or power to correct the former, they cannot take cognizance of the latter, except in cases where the whole tax or assessment, or some distinct and clearly defined part thereof, is illegal. We are, therefore, convinced that there can be no tenable middle ground upon this question and that it must ultimately be decided that the action of the Territorial board of equalization, in changing and largely increasing assessed valuations, is entirely valid for all purposes and under all circumstances (except where gross fraud or

mistake can be shown), or that said action is beyond the scope of its jurisdiction and, consequently, wholly invalid. (Maish vs. Territory of Arizona, supra.)

Third. The remedy, by separate action of injunction on the part of each taxpayer whenever his property has been excessively valued by said board, even if it had a legal existence, would not suffice to relieve the arbitrary proceeding of the board, in increasing valuations without evidence or the right of a hearing, of the objections that it violates the provisions of the sixth section of the Oklahoma Organic Act and the fifth amendment to the federal constitution. In order to avoid these objections the statute prescribing the powers and duties of this board or some other statute specifically relating thereto must provide for notice and the right to be heard, either before said board or some other appropriate tribunal, before the obligation of the tax, upon the property owners, becomes absolute; or the board must, at least, be provided with sufficient means for procuring the necessary evidence to enable it to act understandingly in making such increase. (Pittsburg C. C. & St. L. R. Co., vs. Board of Public Works, *supra*,) Why should the courts uphold such a power and then, in order to avoid some of the disastrous consequences flowing from its exercise, constitute themselves assessing boards without the semblance of statutory authority therefor? How unreasonable for the legislature to confer power upon this board to raise assessed valuations *ad libitum*, without notice or evidence, and provide no other remedy than a separate action of injunction by each taxpayer whose assess-

ment has been so raised to more than the cash value of his property. Suppose the board raises the assessed valuation of a county above that of any other county but not above the actual cash value of the property, then what remedy have the taxpayers of the former county, under the rule laid down by the Oklahoma Supreme Court? It is clear that they have none, but, as before stated, it is equally clear that, under the Oklahoma statutes, no tax or assessment can be enjoined unless it be illegal and void.

As hereinbefore suggested the case of State vs. Thomas, *supra*, appears to have been relied on by the Oklahoma Supreme Court as the sole support of authority for holding that the Territorial board of equalization has legal authority to increase, arbitrarily, not only the assessed valuation of a county, but the aggregate assessed valuation of all the counties. (Wallace vs. Bullen, on rehearing, 6 Okla. 757; Bardrick vs. Dillon, *supra*). An examination of the Utah statutes is sufficient, it would seem, to convince the most incredulous that the principles announced in State vs. Thomas (being based on said statutes) cannot be applicable to a similar question arising under the statutes of Oklahoma prescribing the powers and duties of said board. Among other things, it is provided in Sec. 2584 Rev. Stat. Utah 1898, that:

> "The powers and duties of the state board of equalization are as follows: * * * At meetings to equalize the valuation of the taxable property of the several counties in this state for the purpose of taxation; and to that end, upon

such notice to the county auditor of the county affected thereby as it may prescribe by rule, to increase or lower any assessment contained in the assessment book, so as to equalize the assessment of the property, contained therein, and make the assessment conform to the true value in money of the property assessed. To visit as a board or by the individual members thereof, whenever deemed necessary, the several counties of the state, for the purpose of inspecting the property and learning the value thereof. To call before it, or any member thereof, on such visit, any officer of the county, and to require them to produce any public records in their custody. To issue subpœnaes for the attendance of witnesses or production of books before the board, or any member thereof; which subpœnas must be signed by a member of the board and may be served by any person."

Sec. 2585 Id. provides that:

"When, after a general investigation by the board, the property is found to be assessed above or below its full value, the board may, without notice, so determine, and must add to or deduct from the valuation of the real estate, improvements on such real estate, and the personal property, except money, such per cent, respectively, as is sufficient to raise or reduce it to its full cash value.

Sec. 2599 Id. provides for the punishment of persons who willfully disobey the subpœnas of the board and for punishment of officers who refuse to obey its rules. From the foregoing statutory provisions we learn that it is made the duty of the state board of

equalization to find "the true value in money of the property assessed" and to raise or lower each assessment to such value, also that said board is provided with ample means for ascertaining such value. Furthermore, the constitutional question here under consideration was not noticed and, presumably, not raised in State vs. Thomas, *supra*, but the court rendered judgment in favor of the relators, on other grounds, and set aside the order of said board increasing the assessment of the property of Salt Lake county. Chief Justice Zane concurred, only, in the judgment. In an earlier case which was not referred to in State vs. Thomas, the Supreme Court of Utah states the rule, which we are contending for, in the following forceful language, towit:

> "It must be conceded that there are, in jurisprudence, like axioms in exact science, certain fundamental principles which cannot be negatived or disregarded. Many of these have been recognized by the courts as well as positively declared by the highest legislative authority. Among other such, in the constitution of the United States, article 5 of the amendments, last two clauses of the article, we find that no person shall "be deprived of life, liberty, or property without due process of the law, nor shall private property be taken for public use without just compensation." This citation, which strongly illustrates the present case, justifies the subjoined statement of practical principles, which are submitted as self-evident in themselves, that is, * * * no tax is legal which is not equally and impartially laid on taxpayers; no

tax is legal which is not economical, honest, and responsible in its administration, and no tax is valid in so far as it fails to secure these conditions to the taxpayer in particular, and to the public in general. Taxation is always one of the most repulsive, and may be one of the most ruinous, exercises of public power. * * * The present case, therefore, strongly illustrates the danger of loose legislation on this most important subject. The law under consideration provides no security for the equality and impartiality of the tax which it purports to authorize. No appeal is allowed the school taxpayer such as is authorized for territorial and county taxes. No court or other tribunal is opened to him where he may be permitted to show that his own tax is too high or his neighbor's too low." (Kerr vs. Wooley; 3 Utah 456, 24 Pac. 831.)

There are cases holding that county board of equalization (composed of the county commissioners, each of whom is supposed to be well acquainted with the assessed valuations of his district), may increase the assessed valuation of a township without evidence or the right of a hearing when the statute prohibits an increase of the aggregate assessed valuation of the county. (Suydam vs. County of Merrick, 19 Neb. 155, 27 N. W. 142.) There are others holding that such local boards may so increase the assessed valuation of a township, but without referring to the question of whether or not said boards have the power to increrse the aggregate assessed valuation of all the property within their jurisdictions. [Field vs. Russell, (Kan.) 17

Pac. 476; Gillett vs. Treasurer Lyon Co., 30 Kan. 166, 1 Pac. 577.] In none of these cases, however, is the constitutional question, presented in the case at bar, discussed or noticed, hence neither of them can be considered any authority whatever upon said question. In Bardrick vs. Dillon, *supra*. the Oklahoma Supreme Court had more directly under consideration the powers of the county boards of equalization, but, as stated therein, the principles announced and conclusions arrived at in this decision apply with equal force to the power of the Territorial board of equalization and Chief Justice Burford, speaking for the court, says: "Our statute contemplates that all taxable property shall be valued for purposes of taxation at its fair cash value; and that assessing officers and equalization boards are bound when performing the duties imposed on them, to keep this fact in view. * * * In making these additions, the aggregate valuation, as shown by the assessor's returns, was materially increased. This manner of executing the power conferred by the statute was not an unreasonable one, and is not open to any valid objection;" citing approvingly Salt Lake City vs. Armstrong, 15 Utah 472, 49 Pac. 641. The principles announced in the case so cited are also inapplicable to the question under discussion, for reasons already stated, towit: dissimilarity between the statutes of Utah and Oklahoma. In the revised statutes of that State of 1898, (which is merely a compilation of the laws previously enacted), we find that the county board of equalization, consisting of the county commissioners:

"Has power, after g ving notice in such manner as it may by rule prescribe, to increase or lower any assessment contained in the assesment book so as to equalize the assessment of the property contained therein and make the assessment conform to the true value of such property in money." (Section 2575). Also that: "The board of county commissioners must use the abstract herein before provided for and all other information it may gain from the records of the county recorder or elsewhere in equalizing the assessment of the property of the county." (Sec. 2580.) After an exhaustive examination of the decided cases and provisions of the various statutes, we conclude this branch of our argument by stating that, we believe, no authority other than the Oklahoma decisions, can be found declaring a different rule than that contended for or holding that such facts as are presented by the record in this case would not bring the question under considerarion fairly within the inhibition prescribed by article 5 of the amendments to the Federal constitution.

IV.

The order of the Territorial board of equalization, increasing the assessed valuation of Oklahoma County by 24 per cent., being void, the plaintiff in error was and is under no obligation to extend such increase upon the assessment rolls of said county and he cannot be compelled to do so by an action of mandamus.

If the order of the Territorial board of equalization increasing the assessed valuations of Oklahoma and the other counties was void for any of the reasons herein before stated and urged then, of course, it was and is not incumbent upon this plaintiff in error, as county clerk of Oklahoma County, to extend the 24 per cent. increase upon the assessment rolls of said county. The writ of mandamus can only be issued "to compel the performance of an act which the law specially enjoins as a duty, resulting from an office, trust or station;" (Sec. 4595 Okla. Stat. 1893); and the law never "enjoins," upon any person, a compliance with the requirements of an order which is void for lack of jurisdiction in the board or other tribunal making same. This proposition is surely self-evident, but if it need any support of authority, such is to be found in Brownsville vs. Loague, 129 U. S. 493, wherein it is held that:

> "Mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority. * * * The power invoked is not the power to tax to pay judgments, but the power to tax to pay bonds, considered as distinct and independent, and there-

fore, when the relator is obliged to go behind his judgments as money judgments merely, to obtain the remedy pertaining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void and that no such remedy exists. *Res judicata* may render straight that which is crooked, and black that which is white, * * * but where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever." (See also Bayard vs. U. S., 127 U. S. 246; Knox County vs. Aspenwall, 24 How. 376; State vs. Kavanaugh, 24 Neb. 506; People vs. Supervisors of Greene County, 94 N. Y. 600; 14 Am. & Eng. Enc. Law 94; and cases cited under Note 2.)

In State vs. Kavanaugh, *supra*, it is held that:

"Mandamus will issue to compel action when the right of the relator is clear. In this case it cannot be said to be in that condition. The alleged returns presented to the canvassing board are a forgery. To canvas them would be a wrong, the commission of which the courts will not compel. The writ is therefore denied."

In People vs. Supervisors of Greene county, *supra*, it is held that:

"A peremptory writ of mandamus should not be granted where the claim is disputed and its validity controverted."

In fact, it is admitted by the Oklahoma Supreme Court that, if the Territorial board of equalization had no authority "to make the increase in the valuation complained of in said return," such want of authority on the part of said board would be a good defense to an action of mandamus to compel plaintiff in error to extend said increase upon the tax rolls of his county. (Territory vs. Caffrey, 57 Pac. 204.)

We do not deem it necessary here to enter upon a discussion of the questions presented by the motion to dismiss filed on behalf of defendant in error, but call special attention to the argument made and authorities cited upon said question in the brief already filed herein, entitled: "Observations, on Motion to Dismiss Cause and Objections to Allowance of Supersedeas Filed by Defendant in Error and Appellee, Submitted with Leave of Court by Counsel for Plaintiff in Error and Appellant."

Respectfully submitted,

JAMES R. KEATON,
and
FRANCIS J. KEARFUL,
For Plaintiff in Error and Appellant.

JOHN S. FLANNERY,
Of Counsel.

Office Supreme Court U. S.
FILED
MAR 15 1900
JAMES H. McKENNEY
CLERK

No. 182.
Add'l Brf. of Relator for P. E.

Filed Mar. 15, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 182.

RICHARD F. CAFFREY, COUNTY CLERK OF OKLAHOMA COUNTY, OKLAHOMA TERRITORY, PLAINTIFF IN ERROR AND APPELLANT,

vs.

TERRITORY OF OKLAHOMA *EX REL.* HARPER S. CUNNINGHAM, ATTORNEY GENERAL, DEFENDANT IN ERROR, APPELLEE.

Additional Citation of Authorities on Question of Jurisdiction.

That plaintiff in error, as clerk of Oklahoma county, may defend this action on the ground that the action of the territorial board of Oklahoma in raising the assessed valuation of Oklahoma and the other counties of the Territory is illegal and void. (See, in addition to the authorities cited in our brief at pp. 50, 51, and 52 under subdivision 4, People *vs.* Lothrop, 3 Colo., 428; State *vs.* Raine, 47 O. St.,

447.) In Illinois a ministerial officer may defend on the ground that to comply would violate some constitutional provision (Mix *vs.* The People, 72 Ill., 241). We claim that the action of the territorial board of equalization is in contravention of the organic act and the fifth amendment to the Federal Constitution. (See also People *vs.* Mayor, etc., of Chicago, 51 Ill., 17; People *vs.* Board of Supervisors, 64 N. Y., 600.)

Respectfully submitted.

JAMES R. KEATON,
Counsel for Plaintiff in Error.

No. 182.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 182.

RICHARD F. CAFFREY, COUNTY CLERK OF OKLAHOMA COUNTY, OKLAHOMA TERRITORY, PLAINTIFF IN ERROR AND APPELLANT,

vs.

TERRITORY OF OKLAHOMA *EX REL.* HARPER S. CUNNINGHAM, ATTORNEY GENERAL, DEFENDANT IN ERROR, APPELLEE.

ADDITIONAL SHOWING IN SUPPORT OF MOTION FOR ORDER ALLOWING SUPERSEDEAS.

Comes now Richard F. Caffrey, the plaintiff in error and appellant above named, by his counsel, James R. Keaton, and, as an additional showing in support of his motion for an order allowing him a supersedeas in said cause, submits the affidavits of himself and Henry Overholser, showing the amount in controversy therein to be the sum of twenty-six thousand eight hundred and twenty-two dollars and eighteen cents ($26,822.18), which said affidavits are hereto attached,

made parts hereof, and marked "Exhibits A and B," respectively.

Wherefore plaintiff in error and appellant prays that his motion for order allowing supersedeas or other appropriate order be granted.

JAMES R. KEATON,
For Plaintiff in Error and Appellant.

The above-named defendant in error and appellee, by Harper S. Cunningham, its attorney general, hereby acknowledges due personal service of the foregoing additional showing in support of the motion for an order allowing a supersedeas in said cause and of the exhibits attached thereto by the delivery to him of full, true, and complete copies thereof this 12th day of January, 1899.

HARPER S. CUNNINGHAM,
For Defendant in Error and Appellee.

EXHIBIT A.

Affidavit.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1898.

RICHARD F. CAFFREY, *County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error, Appellant,*
vs.
TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, *Attorney General, Defendant in Error, Appellee.*

TERRITORY OF OKLAHOMA, *Oklahoma County,* } *ss:*

Richard F. Caffrey, of lawful age, being first duly sworn, deposes and says that he is the clerk of said above-named county and plaintiff in error and appellant in the above-entitled action; that he has made a careful calculation of the

amount which the taxes of said Oklahoma county will be increased, if the increase in the assessed valuation of all the property (except the railroad property) of said county made by the territorial board of equalization is extended upon the tax-rolls thereof, and that the result of said calculation is as follows:

Increase of the territorial taxes.....	$3,179 27
Increase of the county, township, and municipal taxes.....	14,777 52
Increase of the school taxes.....	8,865 39
Total increase of the taxes of said county.	$26,822 18

Affiant further states that he is advised by his counsel and verily believes that at the time of the commencement of this action and at all times subsequent thereto there has been no possible legal way in which the rates of the levies for the various county and municipal purposes could be in any manner reduced had he complied with the order and judgment of the supreme court of the Territory of Oklahoma by extending said increase in the assessed valuation of the property of said county made by the territorial board of equalization upon the tax-rolls thereof.

RICHARD F. CAFFREY.

Subscribed and sworn to before me this 10th day of January, 1899.

{ Seal of Harry V. Pratt, Notary Public, Oklahoma County, Okla. }

HARRY V. PRATT,
Notary Public.

My commission expires Dec. 9, 1902.

EXHIBIT B.

Affidavit.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1898.

RICHARD F. CAFFREY, *County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error and Appellant,*
vs.
TERRITORY OF OKLAHOMA *ex Rel.* HARPER S. CUNNINGHAM, *Attorney General, Defendant in Error, Appellee.*

TERRITORY OF OKLAHOMA, *Oklahoma County,* } ss:

Comes now Henry Overholser, of lawful age, who, being first duly sworn, deposes and says that he is now and has been continuously since the first day of January, 1893, a member of the board of county commissioners of said Oklahoma county, and knows personally that said board, at its July meetings in 1898 fixed the rates of the levies for the various county funds by taking as a basis the original assessed valuation of all the property (exclusive of the railroad property therein) of said county, to wit, three million eighty thousand six hundred and ninety-five ($3,080,695.00) dollars; also that the increase in the assessed valuation of the property of said county made by the territorial board of equalization will, if extended upon the tax-rolls of said county, increase the amount of county taxes proportionately, and that it will, if so extended, cause an increase of the amount of said county taxes in the sum of about twenty-three thousand six hundred and forty-two dollars and ninety-one cents ($23,642.91), making a total increase in the amount of taxes that the tax-payers of said county will have to pay if said increase in the assessed valuation made by the territorial board of equalization is so extended of

about twenty-six thousand eight hundred twenty-two dollars and eighteen cents ($26,822.18).

And further affiant saith not.

HENRY OVERHOLSER.

Subscribed and sworn to before me this 11th day of January, 1899.

[Seal County Clerk, Oklahoma County, Okla. Ter.]

R. F. CAFFREY,
County Clerk,
By A. G. CAFFREY, *Deputy*.

[Endorsed:] No. 661. October term, 1898. In the Supreme Court of the United States, October term, 1898. Richard F. Caffrey, county clerk, *vs.* Territory of Oklahoma *ex rel.* Harper S. Cunningham, attorney general. Additional showing in support of motion for order allowing supersedeas. James R. Keaton, for plaintiff in error and appellant.

[Endorsed:] File No., 17,246. Supreme Court U. S., October term, 1898. Term No., 661. Richard F. Caffrey, app't, *vs.* The Territory of Oklahoma. Affidavits in support of motion. Filed Jan'y 23, 1899.

No. 661. 1899

Ter. of Oklahoma ex rel. Cunningham, Atty. Gen. vs. O. C. Caffrey, Co. Clerk.

Objections to order allowing supersedeas.

Office Supreme Court U. S.
FILED
JAN 11 1899
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

Filed Jan. 11, 1899.

No. 661.

RICHARD F. CAFFREY, County Clerk, Oklahoma County, Oklahoma Territory, Plaintiff in Error and Appellant,

vs.

TERRITORY OF OKLAHOMA ex Rel. HARPER S. CUNNINGHAM, Attorney General, Defendant in Error and Appellee.

Objections to Order Allowing Supersedeas.

Comes now the defendant in error and appellee, The Territory of Oklahoma *ex rel.* Harper S. Cunningham, attorney general, and enters an appearance in the above-entitled cause, and objects to the allowing of the order prayed for in the plaintiff's motion for a supersedeas for the following reasons, to wit:

First. For that said cause is not such an one as to entitle the plaintiff in error to appeal in this case, and in support

of said suggestion the appellee shows to the court that this is a case involving simply the performance of a ministerial duty by a ministerial officer by mandamus in a court of competent jurisdiction, as an inspection of the record will show.

Second. That no Federal question is involved in said case.

Third. That the sum of five thousand dollars is not involved, but only the sum of $3,179.27 is involved, even if the total increased amount of taxes occasioned by the action of said board of equalization in adding to the returned assessed values of Oklahoma county were all collected and should be considered to be involved in this case, as is shown by the affidavit and certificate of the auditor of the Territory of Oklahoma; which affidavit is here referred to, marked "Exhibit A," and made a part of this ground of objection.

Fourth. For that the defense sought to be set up to this action was no defense whatever, as the matters and things therein sought to be set up and tried as a matter of defense had been before the supreme court of the Territory of Oklahoma in the case of Wallace *vs.* Bullen, reported in the 6th Oklahoma, page 17, and were also involved in the case of Stiles *vs.* Gray, reported in 6 Okla., at page 455, and were before the Supreme Court of the United States on appeal in the case of Gay *vs.* Thomas, and were by that court remanded to the territorial supreme court for final decision, as reported in volume 169, Reports of the Supreme Court of the United States, at page 264, and were finally decided by the supreme court of the Territory of Oklahoma in Wallace *vs.* Bullen, 6 Oklahoma, 757, which case was not appealed and became the settled law of the Territory of Oklahoma upon the subject involved.

For the above reasons appellee asks that the order deny-

ing supersedeas in said cause be made by the Supreme Court.

HARPER S. CUNNINGHAM,
Attorney General.

EXHIBIT A.

TERRITORY OF OKLAHOMA, *County of Logan,* } ss:

S. N. Hopkins, of lawful age, being first duly sworn, on his oath says:

That he is the duly appointed, qualified, and acting auditor of the Territory of Oklahoma and as such officer has charge of the books, records, and papers pertaining to the territorial board of equalization of taxes; that he has examined said records for the purpose of making this affidavit; that exclusive of the valuation of railroad property, which is three hundred thirty-six thousand six hundred and ninety-three ($336,693) dollars and which is not affected in any way by the action of the territorial board of equalization, as hereinafter mentioned, and which does not increase the amount of taxes affected by the action of said board, the total valuation of the property of Oklahoma county, in the Territory of Oklahoma, as returned by the county clerk to the territorial board of equalization, was three million eighty thousand six hundred and ninety-five dollars ($3,080,695); that the amount of the valuation of the county of Oklahoma as equalized by the territorial board of equalization was fixed at three million eight hundred twenty thousand and sixty-one ($3,820,061) dollars; that the amount of the raise added by said board to the returns of the assessors was seven hundred thirty-nine thousand three hundred and sixty-six ($739,366) dollars; that the amount of territorial taxes levied for the year 1898 by

law and by the territorial board of equalization as required by law was four and three-tenths mills on the dollar of valuation; that the local taxes in the county of Oklahoma were required by law to be levied upon the basis of valuation certified to the county clerk by the territorial board of equalization and in such amount as had been estimated by the board of county commissioners of said county at their July, 1898, meeting, as required by law, the amount of said local taxes not being in any manner whatever affected by the territorial board of equalization in equalizing as above set forth, except as to the rate of per cent. which would be required to raise the amount so estimated by said board as being sufficient and necessary for the county and local expenses during said year; that the effect of the raise in valuation in such equalization by said territorial board was simply to increase the taxes of the citizens of Oklahoma county by four and three-tenths mills per cent. upon the amount of the increase so added to the valuations returned by the assessors to the territorial board of equalization; that four and three-tenths mills per cent. upon the said amount, to wit, seven hundred thirty-nine thousand three hundred and sixty-six ($739,366) dollars, would produce the sum of three thousand one hundred seventy-nine dollars and twenty-seven cents ($3,179.27).

Further affiant saith not.

S. N. HOPKINS, *Auditor.*

Sworn to and subscribed before me this 4 day of January, A. D. 1899.

{ Seal of Albin A. Stevens, Notary Public, Guthrie, Logan Co., Okla. }

ALBIN A. STEVENS,
Notary Public.

My commission expires April 12, 1901.

Due personal service of the above objections and motions is hereby acknowledged this 7 day of January, A. D. 1899.

JAMES R. KEATON,
Attorney for Plaintiff in Error and Appellant.

[Endorsed:] File No. 17246. Supreme Court U. S., October term, 1898. Term No., 661. Richard F. Caffrey *et al.*, P. E. and app't, *vs.* The Territory of Oklahoma, &c. Objections to application for supersedeas. Filed January 11, 1899.

No. 182.

Brf. of Cunningham, Atty Gen'l

SUPREME COURT U.S.
FILED
MAR 6 1900
JAMES H. McKENNEY,
Clerk

Filed Mar. 6, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

RICHARD F. CAFFREY, County Clerk of Oklahoma County, Oklahoma Territory, Plaintiff in Error and Appellant,

vs.

THE TERRITORY OF OKLAHOMA, ex rel., Harper S. Cunningham, Attorney General, Defendant in Error and Appellee.

No. 182.

BRIEF FOR DEFENDANT IN ERROR AND APPELLEE.

HARPER S. CUNNINGHAM,
CHARLES DICK, and
FREDERICK C. BRYAN,
For Defendant in Error and Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 182.

STATEMENT OF FACT.

This was an action of mandamus brought in the Supreme Court of the Territory of Oklahoma on the relation of the Attorney General to compel the County Clerk of Oklahoma County to carry out a lawful order of the Territorial Board of Equalization and perform a duty imposed on him by the statutes of the Territory.

Section 5624 of the Revised Statutes of Oklahoma, as amended March 8, 1895 (Session Laws, 1895, p. 15), provides that the Territorial Board of Equalization shall consist of the Governor of the Territory, the Territorial Auditor, and the Territorial Secretary, which shall meet on the third Monday in June each year at the Capital to examine the various county assessments and to equalize the same; to decide on the rate of territorial tax and to equalize the levy of such taxes throughout the Territory; and shall, furthermore, find the percentage that must be added to or deducted from the assessed value of each county, and shall then order the percentages so found to be added to or subtracted from the assessed values of each of the various counties of the Territory; and shall notify the various County Clerks of the percentage so ordered to be added to or subtracted

from the valuation of property in their respective counties. It shall then be the duty of the various County Clerks to add to or deduct from the total value of the property assessed to each party the percentage so ordered and collect the tax accordingly.

Pursuant to this statute the Territorial Board of Equalization for the Territory of Oklahoma met in the Auditor's office in the city of Guthrie, the Capital of the Territory, on the third Monday of June, 1898, being the 20th day of the month, two members being present. The abstracts of assessments not having been received from the counties the Board adjourned to meet Saturday, June 25, at 4 o'clock p. m. On that day the Board met at the Auditor's office pursuant to adjournment, all members being present; but the abstracts of assessment not yet having been received from all the counties, the Board adjourned to meet at the Auditor's office on Monday, June 27, at 10 o'clock a. m.

On June 27 the Board met pursuant to adjournment, two members being present. All abstracts of assessment except from one county having been received by the Secretary of the Board, the Board at once entered upon the work of making a levy. From the computation made by the Secretary of the Board it was found necessary to make certain changes in the county returns as reported, and, on motion, such changes were ordered to be made, to-wit:

Oklahoma County—Per cent increase, 24 per cent.

The only assessment which was allowed to stand as fixed by the County Boards of Equalization was that of Pottawatomie County.

On said 27th day of June, 1898, due and proper notice was sent by the Secretary of the Territorial Board of Equalization to the County Clerk of Oklahoma County,

Oklahoma Territory, to the effect that 24 per centum had been ordered added by the Territorial Board of Equalization to the total valuation of said county as reported by said County Clerk.

Said County Clerk, the appellant herein, failed and refused to add to the total value of the property assessed, as aforesaid, to each property owner in said county, as was his duty, the percentage so found and ordered by the Territorial Board of Equalization, and to extend said valuation so increased by said percentage upon the tax rolls of said Oklahoma County.

The Attorney General of the Territory of Oklahoma commenced legal proceedings in the Supreme Court of the Territory, by which, on August 12, 1898, an alternative writ of mandamus was issued against said appellant, the defendant below, requiring him to extend the valuations of property in Oklahoma County in the amount of 24 per cent. so found and ordered by the Territorial Board of Equalization to be added thereto, or show cause to the contrary.

Defendant filed his answer to said alternative writ on December 1, 1898, alleging among other things that the action of the Territorial Board of Equalization was without due process of law because no notice was given of this intended action; that said order was not made to equalize values, but for the illegal purpose of increasing the aggregate valuation of all the property in the Territory; that said order was made without competent evidence other than that of the assessment rolls of the various counties; that the assessment in Pottawatomie County appears to have been taken as the basis or standard on which valuations in Oklahoma County were raised; that the valuation on property in Oklahoma County, as shown by

the assessment roll certified by the defendant to the Territorial Board of Equalization, was its fair and true cash value, and is as high and in some cases higher than in Pottawatomie County; that a large part of the property so assessed and whose valuation is so increased consists of money, all of which facts are claimed to appear from copies attached of the assessment rolls in Oklahoma and Pottawatomie Counties; that defendant was ordered by the Board of County Commissioners in Oklahoma County not to comply with said order of the Territorial Board of Equalization, which said order defendant alleges was made because all the taxable property in Oklahoma County had already been valued at its actual and true cash value and is higher than in Pottawatomie County, to prove which alleged state of facts he demands a trial by jury; and said order of said County Board of Commissioners was further made because said order of the Territorial Board of Equalization was made without any notice or any opportunity for hearing.

When said order of the County Commissioners of Oklahoma County was made does not appear. A copy is found on page 15 of the record, marked "Exhibit D." The copy is certified to under date of August 31, 1898, the day before this defendant filed his answer to the alternative writ of mandamus, and there is no claim that the order was actually made before that day.

On page eleven of the record is "Exhibit B," giving the valuation of property assessed for taxation in Pottawatomie County as fixed by the County Board of Equalization. On page 13 of the record appears "Exhibit C," giving the valuation of property assessed for taxation in Oklahoma County, as fixed by the County Board of Equalization. Comparison between the two

returns to show relative assessments made on the same classes of property can only be shown on a few items, as follows:

	Pottawatomie Co.	Oklahoma Co.
Horses, average value	$14.87	$14.50
Asses and mules, average value	25.59	17.73
Cattle, six months old and over, average value	14.11	10.22
Swine, over three months old, average value	1.75	1.61

A demurrer to said return or answer of defendant to the alternative writ was sustained September 3, 1898, and a peremptory writ of mandamus issued against the defendant September 21. On October 1, 1898, defendant filed what he termed a reply to the apparent order of peremptory writ of mandamus and asked the court to state its findings of fact and law severally on the eighteen counts of the reply, and in the same pleading took an appeal to this court from said decision and order theretofore made by the Supreme Court of the Territory.

On November 22, 1898, on application of the Attorney General a rule was issued against the defendant requiring him to appear before the Supreme Court of the Territory December 2, 1898, and there show cause, if any, why he should not be punished as for contempt of court for not complying with said peremptory writ of mandamus.

On December 2, 1898, defendant filed an answer and return to said rule to show cause, which said answer was held insufficient, and defendant was, on said second day of December, 1898, adjudged in contempt of court and ordered committed to jail. The Court on the same day overruled the answer or reply of defendant

to the peremptory writ of mandamus and refused to grant a rehearing.

The cause was brought to this court on error and on appeal December 5, 1898.

STATEMENT OF LAW.

JURISDICTION.

The case should be dismissed for lack of jurisdiction. The amount involved is the sum which would be collected from the levy fixed by the Territorial Board of Equalization on the 24 per centum ordered by said Territorial Board to be added to the valuation of Oklahoma County. The total assessed value of the property in Oklahoma County was increased by the Territorial Board in the sum of $739,366. The Territorial tax rate for the year 1898 was four and three-tenths mills on the dollar of valuation, which would realize on the increase of valuation ordered by the Territorial Board the sum of $3,179.27. This is the entire amount involved in this case, the entire amount which will be affected one way or another by any decision this Court may render, and is not sufficient to give jurisdiction. The levy of taxes for county purposes is made by the County Commissioners, and is not at all involved or affected by the action of the Territorial Board of Equalization (Session Laws of Oklahoma, 1895, p. 218).

DUTY OF COUNTY CLERK.

Under Section 5624 of the Revised Statutes of the Territory of Oklahoma it is made the duty of the County Clerk to add to the tax duplicate of the county any increase of valuation of the property in said county or-

dered to be added thereto by the Territorial Board of Equalization. His duty in said premises is purely ministerial, and he is not at liberty to disobey the mandate of the Territorial Board.

The Supreme Court of Illinois, in Mix vs. The People, ex rel, 72 Ill., 241, has said:

"The County Clerk is a ministerial officer and has no discretion in acting under the orders of the Board of Supervisors in extending taxes upon their equalization; and if he refuses to extend the tax on their equalization he does so on his peril, and can only justify such refusal on the ground that to do so would violate the constitution of the State."

See also 25 Am. and Eng. Ency. of Law, 260.

POWER OF TERRITORIAL BOARD.

The action of the Territorial Board in raising the total valuation of the taxable property of the Territory is strictly legal and in accordance with the law of the Territory. This question has been passed on fully by the Supreme Court of the Territory. The question came up first in the case of Wallace vs. Bullen, 6 Okla., 17. The Court in this case held that the revenue laws of the Territory establish one system for levying and collecting taxes, and that under such system all property is made subject to taxation and required to be assessed at its true value. The Territorial Board of Equalization is the ultimate and final tribunal of review, with power of equalization, to the end that all valuations of property shall be at its true value. When the Territorial Board finds that one county has returned its property at the true cash value and that every other county had returned its property below the true cash value, the Board may order that such percentage be added to the

valuations of property in the other counties as will bring their assessments up to the true cash value. The Territorial Board may lawfully increase the aggregate valuation of property in the several counties of the Territory in order to put the valuation on the basis of the true cash value of all the property in the territory.

In Wallace vs. Bullen, supra, the Court said: To equalize means to make equal to, to take a standard and make all other objects conform thereto. The Territorial Board of Equalization may do so, notwithstanding it increases the aggregate valuation in the Territory.

This decision was reversed in Gray et al. vs. Stiles, Treasurer, in 6 Okla., 455, but was reaffirmed in Wallace vs. Bullen, 6 Okla., 757, and was again reaffirmed in Webb & Jones vs. Renfrew et al., 7 Okla., 198.

In Weber et al. vs. Dillon, Treasurer, 7 Okla., 568, the Court again held that the Territorial Board of Equalization may adopt the returns of any county which in its judgment the most nearly represents the actual value of all the property therein, and equalize all the other counties by either raising or lowering their assessment to conform to the standard adopted, even if the total taxable valuation of the Territory is thereby increased. In Bardrick vs. Dillon, 7 Okla., 535, the Court announced the same doctrine with regard to the right of the County Board to equalize and increase the aggregate valuation of the property in its county. This doctrine remained the law of the Territory until February 24, 1899, when a law was enacted by the Territory Legislature providing that the Territorial Board of Equalization shall not increase or decrease the aggregate grand total of the valuation of the taxable property of the Territory.

The organic act of the Territory, Section 6, provides:

"Nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

This record further shows that the increase in the aggregate valuation of the property of the Territory was actually necessary and incidental to a proper and just equalization.

It is clear then that the mandate of the Supreme Court of the Territory made in this case against the appellant was strictly in accordance with the law of the Territory, and there was no excuse whatever for disobeying said mandate.

This very question was by this Court, in the concluding paragraphs of the opinion rendered in Thomas vs. Gay, 169 U. S., 264, referred back to the Supreme Court of the Territory, where the question was then pending on an order for a rehearing. The question was finally decided in Wallace vs. Bullen, 6 Okla., 757, no appeal was ever taken therefrom and the doctrine there finally established became the settled law of the Territory.

DUE PROCESS OF LAW.

It is stated, however, that the action of the Territorial Board of Equalization was illegal because "without due process of law." The process of law in the enforcement and collection of a tax does not require that persons taxed by the law of the State shall be present or have an opportunity to be present when the tax is assessed against them. A statute giving a taxpayer the right to enjoin the collection of a tax and have its validity decided by a court of justice is due process of law.

McMillen vs. Anderson, 5 Otto, 37.

Section 4143, Statutes of Oklahoma, expressly provides that injunction will lie to enjoin the illegal levy or the collection of any illegal tax, and the Court held in Wallace et al. vs. Bullen, supra, that even without express statutory authority the general powers of a court of equity would be ample to afford relief in such a case.

25 Am. and Eng. Ency. of Law, 254, and cases cited.

This Court has held, in "State Railroad Tax" cases, 92 U. S., 575, as follows:

"The main function of this Board is to equalize its assessments over the whole State. If they find that a county has had its property assessed too high in reference to the general standard they may reduce its valuation; if it has been fixed too low, they raise it to that standard. When they raise it in any county they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet, if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this Board impossible. Nor is there any hardship in the matter. This Board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of anyone before it to assert a right or redress a wrong; and in the assessing of a tax this is all that can be reasonably asked."

Affirmed in Pittsburg & C., C., St. L. R. R. Co. vs. Backus, 154 U. S., 421.

The necessity of revenue for the support of the government does not admit of the delay attendant upon

proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments.

McMillen vs. Anderson, 5 Otto, 37.

In Hagar vs. Reclamation District, No. 108, 111 U. S., 701, this Court stated that the law in prescribing when the Board of Equalization meets gives all the notice required and the proceeding by which the valuation is determined, though it may be followed if the tax be not paid by the sale of the delinquent's property is due process of law.

Davidson vs. New Orleans, 96 U. S., 97.
See also Cincinnati (etc.) R. R. Co., vs. Kentucky, 115 U. S., 321.

Section 5624, Statutes of Oklahoma, as amended March 8, 1895, provided that the Territorial Board of Equalization should meet on the third Monday in June of each year at the Capital. This was due notice to everyone of the time and place of meeting of the Board.

The Board has evidence before it on which to act. The Supreme Court of the Territory had held that the Board could take the returns of any county in the Territory as a standard and could increase or decrease the assessments in the other counties to conform to that standard. It is not alleged that such a course was pursued in this case. The statement in the defendant's answer and return to the alternative writ of mandamus that—

"The assessed valuation of the property, both real and personal, of Pottawatomie County, as certified to said Board by the County Clerk thereof, appears to have been taken as a basis for the pretended equalization of the assessed valuation of the other counties and for its action in increasing the aggregate assessed valuation

of said Oklahoma County 24 per centum of its original valuation"

is entirely too indefinite, and is not such a specific allegation as is required by the rules of pleading to entitle it to attention. The Board may have acted on their own personal knowledge, as was their privilege. They were at liberty to act on any evidence satisfactory to themselves and to avail themselves of such information as they deemed proper, and the presumption is that they had sufficient evidence.

See 25 Am. and Eng. Ency. of Law, 258, and note 3.

Fields vs. Russell, 38 Kan., 720.

"Where the record does not show by affirmative proof that the Board did not act upon evidence before it, its order in the premises is conclusive that it did act upon such evidence as was necessary."

Hagenmeyer vs. Mendocino County, 62 Cal. 214.

EXCESSIVE VALUATION.

It does not appear that any property in Oklahoma County was, by the action of the Territorial Board of Equalization, which is complained of, appraised at more than its true value in money. It is alleged in appellant's answer and return to the alternative writ of mandamus that a large part of the property in said county so assessed, and whose valuation is increased by the order of said Territorial Board of Equalization, consists of money whose valuation was increased by said order of the Territorial Board of Equalization to the extent of 24 per centum thereof, *as is shown by the assessment roll of said county*, a copy of which was at-

tached to the answer and return and marked "Exhibit C." It appears by said statement of the property assessed for taxation in the County of Oklahoma, as fixed by the County Board of Equalization that "moneys and credits" were assessed at an average value of $31,175. How much of that item consists of money and how much of credits does not appear, and no presumption can be drawn that any money was assessed by said County Board at its true value, or that it is assessed at more than its true value, with 24 per cent. added to the valuation. It is not alleged precisely and specifically that any money has been assessed at more than its true value in money; the allegation is that said fact appears from the assessment roll of Oklahoma County, which appears in the record marked "Exhibit C," but such record fails to bear out such allegation, and the allegation must therefore fall.

REMEDY.

If any property has been valued more than its actual true value the remedy is by injunction to restrain the collection of the tax in excess of the proper amount.

Weber vs. Dillon, Treasurer, supra; 25 Am. and Eng. Ency. of Law, pages 259 and 448.

"A levy of tax in excess of the per cent. allowed by the constitution does not render the whole tax void, but only so much as is in excess of the constitutional limit if the tax within the constitutional limit can be separated from the portion that is in excess of that limit."

Mix vs. People, 72 Ill., 241.

If the said Board of Equalization was authorized to take the action it did the validity of said action cannot be attacked by defendant in a suit of mandamus brought to enforce its action.

It has been held repeatedly that a Board of Equalization having the authority and acting in the mode pursued by the Territorial Board of Equalization in this case acts in a quasi-judicial manner, and its judgments in such cases when duly made cannot be attacked collaterally in an action at law except for fraud or want of jurisdiction.

No allegation charging fraud has been made in this case and no mere discrepancy between the valuation of property made by the Territorial Board, and the judgment of the Court in that regard is sufficient to impeach such assessment for fraud.

St. Louis Bridge R. R. Co. vs People, 127 Ill., 627.

25 Am. and Eng. Ency. of Law, page 261.

This Court stated, in "State Railroad Tax" cases, supra:

"As all valuation of property is more or less a matter of opinion we see no reason why the opinion of this Court, or of the Circuit Court, should be better or should be substituted for that of the Board whose opinion the law has declared to be the one to govern in the matter."

And if the Board made an excessive estimate of the value of property it is

"by an error of judgment in the officers whose judgment the law confided that matter; and it does not lie with the Court to substitute its own judgment for that of the tribunal expressly created for that purpose."

See also 25 Am. and Eng. Ency. of Law, p. 261.

In a case involving some similar questions, and which came to this Court from the Territory of Oklahoma, it was held:

"The lawmaking power is to determine all question of discretion or policy in ordering or apportioning taxes and all necessary rules and regulations for their collection. Such questions are not for the courts unless the Legislature transcends its functions."

Thomas vs. Gay, 169 U. S., 264.

SUMMARY OF LAW.

The law on this entire subject is well summed up in Cooley on Taxation (2d edition, pp. 422, 748, 750 and notes).

These boards act judicially in equalizing valuations, and their decision, if they keep within their jurisdiction, is conclusive, except as otherwise provided by law. They act on their own judgment of what is equal and just. They are not bound to give notice to taxpayers before raising the assessment of a district except as the statute may provide for it. Any error in the fact of the valuation of property cannot be corrected here. Jurisdiction is expressly given in equity to afford relief against any erroneous judgment of the assessing board, and such remedy is exclusive.

CONCLUSION.

The conclusions clearly drawn from the foregoing are:

1. The Territorial Board of Equalization acted clearly within its jurisdiction in taking the action it did.

2. There was no absence of "due process of law."

3. It does not appear from the record that the Territorial Board of Equalization assessed any property in Oklahoma County at more than its true value in money.

4. As far as any comparison can be made of the rec-

ords the assessments in Oklahoma County were considerably lower than those in Pottawatomie County.

5. Equity furnishes ample relief if the action of the Territorial Board was erroneous, and such remedy is exclusive.

6. The duty of the County Clerk in the premises is purely ministerial and he has no excuse for disobeying the mandate of the Court below.

7. Writ of error should be dismissed and judgment below affirmed.

Respectfully submitted,

HARPER S. CUNNINGHAM,
CHARLES DICK, and
FREDERICK C. BRYAN,
For Defendant in Error and Appellee.

No. 182.

Office Supreme Court U. S.
FILED
MAR 6 1899
JAMES H. McKENNEY,
Clerk.

In the Supreme Court

Motion by D. C. to dismiss.

OF THE

United States,

Filed March 6, 1899.

OCTOBER TERM, 1898.

RICHARD F. CAFFREY, County Clerk,
Oklahoma County,
Oklahoma Territory,
Plaintiff-in-Error and Appellant,

vs.

No. ~~—~~ 182

TERRITORY OF OKLAHOMA, ex rel.
Harper S. Cunningham,
Attorney General,
Defendant-in-Error and Appellee.

MOTION TO DISMISS.

HARPER S. CUNNINGHAM,
Attorney General.

In the Supreme Court

OF THE

United States,

OCTOBER TERM, 1898.

RICHARD F. CAFFREY, County Clerk,
Oklahoma County,
Oklahoma Territory,
Plaintiff-in-Error and Appellant,

vs.

No. 661

TERRITORY OF OKLAHOMA, ex rel.
Harper S. Cunningham,
Attorney General,
Defendant-in-Error and Appellee.

MOTION TO DISMISS.

Comes now the appellee, by its counsel appearing in that behalf, and moves the court to dismiss the appeal in the above entitled cause for want of jurisdic-

tion because the judgment or decree from which said appeal purports to have been taken is the judgment or decree of the Supreme Court of the Territory of Oklahoma and it is apparent from an inspection of said record that no federal question is involved in said cause:

For that the sum of five thousand dollars is not involved in said cause as is shown by the affidavit of the Territorial Auditor hereto attached, marked "Exhibit A" and made a part of this motion.

And the said appellee, by counsel as aforesaid, also moves the court to affirm the said judgment or decree rom which said appeal purports to have been taken, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only and for the purpose of evading the penalty adjudged against the appellant as for contempt of court for failure to comply with the peremptory writ of mandamus issued in this case.

HARPER S. CUNNINGHAM,
Attorney General of Oklahoma.

EXHIBIT A.

Territory of Oklahoma, } ss
County of Logan, }

S. N. Hopkins of lawful age being duly sworn on his oath says:

That he is the duly appointed, qualified and acting Auditor of the Territory of Oklahoma and as such officer has charge of the books, records and papers pertaining to the Territorial Board of Equalization of Taxes; that he has examined said records for the purpose of making this affidavit; that exclusive of the valuation of Railroad property which is three hundred thirty-six thousand, six hundred and ninety-three ($336,693.00) dollars, and which is not affected in any way by the action of the Territorial Board of Equalization as hereafter mentioned and which does not increase the amount of taxes affected by the action of said Board, the total valuation of the property of Oklahoma county in the Territory of Oklahoma as returned by the County Clerk to the Territorial Board of Equalization was three million, eighty thousand, six hundred and ninety-five dollars ($3,080,695); that the amount of the valuation of the County of Oklahoma as equalized by the Territorial Board of Equalization was fixed at three million, eight hundred twenty thousand and sixty-one ($3,820,061.00) dollars; that the amount of the raise added by said Board to the returns of the assessors was seven hundred thirty-nine thousand, three hundred and sixty-six ($739,366.00) dollars; that the amount of Territorial Taxes levied for the year 1898 by law and by the Territorial Board of Equalization as required by law was four and three-tenths mills on the dollar of valuation; that the local taxes in the County of Oklahoma were required by law to be levied

upon the basis of valuation certified to the County Clerk by the Territorial Board of Equalization, and in such amount as had been estimated by the Board of County Commissioners of said county at their July, 1898, meeting, as required by law, the amount of said local taxes not beng in any manner whatever affected by the Territorial Board of Equalization in equalizing as above set forth—except as to the rate of per cent which would be required to raise the amount so estimated by said Board as being sufficient and necessary for the county and local expenses during said year; that the affect of the raise in valuation in such equalization by said Territorial Board was simply to increase the taxes of the citizens of Oklahoma county by four and three-tenths mills per eent upon the amount of the increase so added to the valuation returned by the assessors to the Territorial Board of Equalization; that four and three-tenths mills per cent upon the said amount, to-wit, seven hundred thirty-nine thousand, three hundred and sixty-six ($739,366.00) dollars would produce the sum of three thousand one hundred seventy-nine dollars and twenty-seven cents ($3,179.27). Further affiant saith not.

S. N. HOPKINS,
Auditor.

Sworn to and subscribed before me this 4 day of January, A. D.

[SEAL] ALBIN A. STEVENS,
Notary Public.

My comission expires April 12, 1901.

Due personal service of the above objections and motions is hereby acknowledged this 7 day of January, A. D., 1899.

JAMES R. KEATON,
Attorney for Plaintiff in Error and Appellant.

To Mr. J. R. Keaton, counsel for appellant:

Please take notice that on Monday the 30th day o' January, A. D., 1899, at the opening of the court, or as soon the eafter as counsel can be heard, the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States for decision of the said court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with said motions in support thereof

HARPER S. CUNNINGHAM,
Attorney General of Oklahoma.

I hereby accept service of the foregoing notice this 7th day of January, 1899.

J. R. KEATON,
Attorney for Caffrey.

CAFFREY *v.* OKLAHOMA TERRITORY.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 182. Argued March 13, 14, 1900.—Decided April 9, 1900.

The plaintiff in error was county clerk of Oklahoma County, Oklahoma Territory. The territorial board of equalization increased the valuation of property in the county, assessed for taxation, twenty-four per cent, and officially notified him of their action. He refused to act upon the notice, and a writ of mandamus was issued from the supreme court of the Territory, to compel him to do so. He declined to obey the writ, was cited for contempt, was adjudged guilty, and was committed to prison until he should comply. There was no evidence, and nothing tending to show that he had any pecuniary interest in the increase. The case being brought here by writ of error and on appeal: *Held*, that as there was nothing to show that the plaintiff in error and appellant was interested in the increase to the extent of five thousand dollars, therefore, under the statute of March 3, 1885, c. 355, 23 Stat. 443, this court had no jurisdiction.

THE case stated in the opinion.

Mr. John S. Flannery and *Mr. James R. Keaton* for plaintiff in error and appellant. *Mr. Francis J. Kearful* was on their brief.

Mr. Frederick C. Bryan for defendant in error and appellee. *Mr. Harper S. Cunningham* and *Mr. Charles Dick* were on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action of mandamus brought by the Territory of Oklahoma on the relation of Harper S. Cunningham, attorney general of the Territory, against Richard F. Caffrey, county clerk of Oklahoma County.

The territorial board of equalization, composed of the Gov-

ernor, the territorial secretary and the auditor, increased the assessed valuation of the property of Oklahoma County twenty-four per cent, and notified the plaintiff in error and appellant thereof, as county clerk.

He refused to comply with the order, and this action was brought in the supreme court of the Territory to compel compliance therewith.

An alternative writ of mandamus was issued, to which he made return and answer. In his return and answer he admitted that he had been duly notified of the order of the board of equalization, and had failed to comply with it, and alleged that it was illegal and void, because, first, the board had no jurisdiction or legal authority to make it; second, that it was not made for the purpose of equalizing the valuation of property, but for other and illegal purposes; that it was made arbitrarily, and without evidence other than the assessment roll; that the valuation of the property of Oklahoma County, as shown by the assessment roll, was fair and as high as the property of Pottawatomie County, which the board took as the basis of equalization; that a large part of the property whose valuation was increased consisted of money.

He also alleged that he was prevented from complying by an order of the board of county commissioners.

He prayed "that he be granted a hearing in behalf of the taxpayers of his county in order that he may establish by competent proof the allegations of fact hereinbefore set out, and that upon a final hearing he have judgment against the relator for his costs in this behalf laid out and expended."

A motion was made by relator to quash the answer and return, which was granted, and on the 21st of September, 1898, judgment was entered granting a peremptory writ of mandamus against the plaintiff in error and appellant.

Declining to obey the writ, he was cited for contempt, and such proceedings were had on the citation that he was adjudged guilty, and committed to jail until he should comply with the writ, and the case was then brought here.

A motion is made to dismiss for want of jurisdiction in this court, which we think should be granted.

It is provided by the act of March 3, 1885, that no appeal or writ of error shall hereafter be allowed from any judgment or decree in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, or unless the validity of a patent or a copyright is involved, or a treaty or statute of, or an authority exercised under, the United States, is drawn in question. 23 Stat. 443.

There is controversy between the parties, respectively supported by affidavits, whether the effect of the order of the territorial board of equalization is to increase the taxes of the county $3179.27, or $28,751.87. But whether it is one sum or the other, the plaintiff in error and appellant does not show that he has any interest in it. He does not allege that he is a property owner or a taxpayer of the county. He alleges he is its county clerk, and bases his resistance to the order of the territorial board of equalization upon his duty as such officer.

However this may have justified his action, of which we express no opinion, or may have caused a dispute which the territorial court had jurisdiction to pass on and determine, it does not give us jurisdiction. To justify our taking jurisdiction there must be a controversy which involves pecuniary value exceeding $5000 to the party appealing. In other words, there must be a dispute which involves a sum in excess of $5000, and such sum, or property of its value, must be taken from him by the judgment which he seeks to review.

Colvin v. *Jackson*, 158 U. S. 456, is in point. It was a suit in equity to restrain the issue of bonds by the city of Jacksonville, and was brought in the Circuit Court of the United States for the Northern District of Florida. Colvin alleged that he was a taxpayer, and that the amount of taxes that would be assessed upon the property owned by him in the city would exceed two thousand dollars. This was denied, and the complainant then contended that not the amount of his taxes but the amount of the bonds proposed to be issued, (one million dollars) was the amount in controversy. The Circuit Court dismissed the case for want of jurisdiction, and this court sustained the ruling, saying by the Chief Justice that "the amount of the interest of